OF

Ogden Edwards

1801 & 2.

The lectures were taken by Ogden Edwards in the years 1801 & 2 at Litchfield. Tapping Reeve & James Gould the Lecturers.

NH/JH 10/16/86 PART

2 of 6

Co

76.1.2 Spc

Of the Nature of Laws in General.

Law, in its most general & comprehensive sense, signifies a rule of action. And it is ~~that~~ a rule of action which is prescribed by some superior, and which the inferior is bound to obey.

The law of nature is that which alone binds in a state of nature, and may be reduced to this precept, "That man shall pursue his own true and substantial happiness".

The law of nations is a system of rules, deducible by natural reason, & established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies & civilities, & to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states & the individuals belonging to each. This general rule is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, & in time of war as little harm as possible, without prejudice to their own real interests.

The divine law, is that which is revealed in the scriptures.

Municipal law is a rule of civil conduct prescribed by the supreme power in the state, commanding what is right & prohibiting what is wrong.

"It is a rule", not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. — It is also a rule, to distinguish it from a command or a compact or agreement.

It is a rule of "civil conduct". This distinguishes it

from ~~municipal law~~ natural or revealed law.

It is likewise a rule "prescribed", because a bare resolution, confined in the breast of the legislator, without manifesting itself by some sign, can never properly be law. 1 Blk Co 43

Laws are of various kinds. ~~1st~~ 1st post facto; ~~Laws~~; ~~is a law which inflicts a punishment upon a person, for an offence which was not at law when committed.~~

~~2d~~ ~~Retrospective; laws is distinguished from~~ ~~or 1st post facto law in this. The latter operates~~ ~~penally~~ civilly, ~~the former civilly~~ penally.

~~In addition to these there are many others;~~ ~~as~~ remedial; declaratory &c see Blk Co. Vol 1.

Of the Laws of England--

The Municipal Law is divided into the Lex scripta and the Lex non scripta.

The Lex non scripta and the Common Law are incorrectly considered as synonymous terms, for the Common Law is only a branch of the Lex non scripta. The Lex non scripta includes three branches. 1 General Customs. 2 Particular Customs. 3 Certain particular laws.

General customs make what is properly called the Common Law.

The ~~the~~ validity of the ~~Common~~ Lex Non Scripta depends upon its having existed from time immemorial, or as the legal phrase is "time whereof the memory of man ~~runneth~~ runneth not to the contrary." The time of legal memory in Eng is ~~reckoned~~ reckoned from the beginning of the reign of Richard the first, which was in the year 1189; therefore any usage having its origin since that time is not Common Law. 2 Blk Co 31

All this is said to be unwritten law, yet the evidence of it may be found 1st In the records of the decisions of Courts of Justice. 2d In books of Reports of such decisions. 3d In Treatises of the learned Sages of the law.

The decisions of Courts of law are called Precedents, they are not in themselves law, but evidence of it. If Courts adopt principles which are opposed to the law they will be disregarded by Courts. It is known a rule of action with Courts to follow precedents, unless they are flatly absurd or unjust, for though the reason may not be at once obvious, yet such is the respect paid to ancient times, that Courts will not suppose that they acted without consideration. 1 Bla Cs 70.

General customs are universal in their operation throughout the realm.

Courts are not presumed to make any law; yet in point of fact they often do. The doctrine of Pleas & Pleadings is entirely the work of Courts; the law relating to Incumbrances Devises & Perpetuities has, but of late years arisen into notice.

Particular Customs are such as are confined to particular districts, and are local in their operation.

If the fact of the existence of ~~such~~ a custom is questioned, it must be determined by a jury; for the Court is not presumed to be acquainted with it. If the jury find the custom to exist, their finding must be recorded, and it can never be again called in question before the same Court. Co Lit 175.

Customs to be regarded must be specially pleaded. ~~They may not be given in evidence under the general issue.~~ To this rule the Gavelkind & Borough English Customs are exceptions. Co Lit 175. 1 Bla 76.

Blackstone calls the law merchant a particular custom, and it is generally so termed; but Judge Story considers this to be inaccurate, for it is not a local usage, nor has it any of the incidents of such an usage, for it need not be specially pleaded & a jury is not requisite to determine its existence. 1 Salk 125. 4 Jn 208. 2 Bro 1218. 22. 1 Wla 75. 2 Ld 459. 60. 7-3 Ld 286. 1 Wla Rep 298.

Customs in derogation of the Common Law must be construed strictly, ~~so~~ a ~~large opinion must not be given & than than their to the writ warrant.~~ 1 Wl Cr 78. 9

Particular Laws are those which are by custom adopted & used only in particular Courts ~~& Jurisdictions~~ of pretty general and extensive jurisdictions. 1 Wla Cr 67

Of the Civil Law.

The Civil Law is the Roman municipal law. It is not binding in England on account of any intrinsic authority which it possesses, but when it is adopted it owes it authority to its being sanctioned by immemorial usage, and ~~to~~ so far ~~as it goes~~ it is part of the leges non scripta. 1 Wla Cr 79. 80.

Of the Authority of the Laws of England in this Country.

As the Civil Law owes it authority in England entirely to its being adopted thus by ~~Statute~~ Statutes or immemorial usage, so in this country is the Common Law indebted for its authority to Statutes which recognize

it & to usage in our Courts of Justice.
Some Lawyers have questioned the existence of a Common Law in this Country, on the ground that, it must have existed immemorially to be of any force, and that this Country was not inhabited by civilized nations at the time limited for legal memory, ~~it cannot be of any force here~~.
But a sufficient answer to this is, that the rule with regard to legal memory is not applicable here, for it would be absurd to adopt it.
Another answer to this objection is, that the law of nature commands every State to procure its own good, and without a Common Law no State or community can exist. Therefore the law of nature constitutes for every community a common Law, without which it is impossible for any State to secure the most simple rights of ~~mankind~~ its citizens, for no State can possibly have all the provisions necessary for such a purpose.

Lex Scripta

The lex scripta is the written or statute law. It is called the written law because it was originally set down in writing; and it is intrinsically the law, not merely evidence of what the law is. 1 Ha Co 84

Statutes are divided into public and private; or general & special.

A public statute is one which operates upon the community at large, and of this ~~the~~ Courts are bound to take notice judicially & ex officio without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it.

Special or private acts are rather exceptions than rules, being those only which ~~only~~ operate upon particular persons, and private concerns, and those which are not promulgated with the same publicity as the former; the Judges are not bound to take notice, unless they are formally ~~shown~~ ~~pleaded~~ pleaded. 1 Ha Co 84.

A statute which respects a genus is a public ~~act~~ statute. But one which respects a species only is a private statute. 4 Co 76a. 2d Ra 381. 1 Hob 88

A statute which relates to all officers privileged to serve precepts is a public statute; but one which only relates to constables is a private statute. Cro Car 120. 460. 76. 19 Vin 496. 8. ~~2 Lev 429.~~

This rule however admits of ~~an~~ exceptions ~~for~~ ~~that~~ of statutes, for instance ~~a public act~~ which implies a fact, ~~statute~~ are public, the which would otherwise be a private act. 4 Co 75 4 Rac 640. Skin 429.

The reason given for this exception is, that as the fact relates to the King, he is concerned, & therefore it shall be deemed a public act. Skin 429.

~~Indorsement~~

~~Any~~ Statutes which affect the Public are also all Public. ~~& public~~ ~~Statutes~~ ~~Bar~~ ~~Non obstante it would be a private.~~ ~~Bar~~. 10 Co. 57 a 37. Plow 65. 12 Mod 249.

Statutes are either declaratory ~~of the Common law~~ or remedial of ~~the Common Law~~ it. E.g. ~~Declaratory~~ When an old custom of the Kingdom has fallen into disuse or become disputable ~~in which case~~ and the Act is passed declaratory to be a rule of the Com: Law, it is called ~~it is a rule of the Common Law~~ a declaratory Act. ~~Have through Jenkins & Dalton~~ ~~the Common Law~~. The remedial Acts are those which are made to supply defects & abridge the superfluities of the Common Law.

Rules respecting Statutes.

~~Rules of Pleading Statutes. &c relating Statutes.~~

As a general rule it is not necessary to plead public Statutes, ~~Bar~~ Nor it is private Statute. 1 Wms Co 85

When public Acts are pleaded it is not necessary to state them; tho' it is otherwise with private Statutes, for the Courts is not presumed to be acquainted with them. 2 Co 76. 2 Rolle 466. 10 Co 57. 4 Bac 655

Altho' it is not necessary to state a public Statute, yet if it is done improperly ~~improperly~~ it is fatal, and ~~it~~ it not cured by verdict. 1 Sid 356. 2 Ra 382 2 Mod 241. 4 Bac 658. g.

If a public Stat is intended to defeat a specialty, the party who would avail himself of it must plead it. 3 Salk 391. Hob 72. 4 Co 59b 60a 119a

There is a difference between pleading & counting upon Statutes, and likewise between counting & reciting Statutes. In pleading a Statute it is not necessary to name it, it is sufficient to state the facts ~~that~~ which bring ~~it within the statute~~ the case within it.

Counting upon a Statute is ~~the~~ simply naming ~~of it simply~~.

Reciting a Stat is ~~the~~ repeating it, either ~~in~~

verbatim or in substance. ~~And~~ In reciting a statute it is ~~always~~ unnecessary to mention the time & place of enacting it, & if that is not done it is bad on demurrer. 1 Com Dig 231 Cro Jac 20. 2 Hawk 246. 14 Vin 507.

It is always necessary to recite a private statute. 4 Co 76. 2 Rolle 466. 2 Mod 57.

It is ~~not necessary~~ unnecessary to recite public statutes. 4 Co 76. 1 Bac 655.

It is not necessary in any case to mention the title, or the preamble of an act, for neither of them is the act itself. 1 Com. Dig 330. 3 Co 33. D. Ro 77. 6 Mod 52

Tho' it is not necessary to recite the title or preamble of an ~~act~~ act, yet a misrecital of them is fatal. This rule however can only have reference to public acts, for a misrecital of the body of a private act is cured by verdict, for it is not the duty of the Court but of the opposite party to detect it. The reason given for this rule is that the party ties up his hands by relying upon that as law which is not law. But upon this there are contradictory decisions, and it seems but reasonable that it should be considered as surplusage. 6 Mod 62. L. Ray 77. in N. Y. Rep.

If a ~~public~~ private statute is declared upon, a plea that there is no such statute is good; but if a public statute is declared upon, a plea that there is no such statute is not good, for such acts are presumed to be within the knowledge of the Court. 4 Co 76 2 Mod 57. 8 Co 28. Co Ent 355

A statute may be part public and part private & the rule in such case is that that wh. is public need not be recited. Plot 227. 10 Co 57.

The rules which relate to construing upon Statutes are very unintelligibly.

As a general rule it is not necessary to construe upon a public statute. 19 Vin 503. Carth 382 4 Bac 38. 6 El 601. 1 Ale 85. 6.

But to this rule there are many exceptions.

If there are Common, and Statute Law remedies it is necessary ~~for him~~ to construe upon the statute if the party would rely upon it, otherwise it will not appear but that the suit was brought upon the Common Law remedy. 1 Comyns 330. Lutw 548 n 48.

It is always necessary to construe upon a penal Statute. All statutes which give ~~new~~ remedies that extend equity are penal ~~all~~ L.y. All statutes which give double damages: 2 Hawk. 356.7. Plow 206. 19 Vin 505. 4 Bac 656.

If one stat: forbids an act, and another ap=pointes the penalty, they must both be construed upon. Plow 206. 19 Vin 505

If a stat gives a new action or form of action unknown to the Com Law it must be construed upon. 19 Vin 504

When a public act not of a penal nature enjoins or prohibits an act which was not noticed at Common Law and gives no ~~new Remedy~~ new remedy, it is not necessary to be construed upon; neither is it necessary to construe upon a stat which applies an old remedy to a new case. ~~Carth 382~~. This rule goes upon the principle that the stat does not alter the rules of pleading. Carth 482. 19 Vin 503. 4. 1 Com 203 a 213. Dyn 83 b 85 a b

If a temporary stat is continued by a subse=quent one it is not necessary to construe upon the second. Otton 1006. 4 Bac 638

If a contract of any kind which was good at Com Law without writing, is a stat required by stat to be in

writing it is not necessary to aver it to be writing, but it is sufficient to produce it in evidence. For such a stat does not alter the rules of pleading. 4 Bac 655. 656. 12 Mod 540.

But if a statute requires a contract, which was not known at Common Law, to be in writing, it is necessary to aver it to be in writing. 2 Mod 540

If a statute gives a right or enjoins a duty, it is necessary that all exceptions in the enacting clause should be negatived in the declaration, for an exception of them is not cured even by verdict. But if the exceptions are not in the enacting clause it is not necessary. In the first case the clause must be taken altogether as a description of the offence.

When the statute & common law offer different remedies it is at the option of the party suing to prosecute either. 2 Burrow 803. 805. Cow 640: Salk 45.

And when a party pursues a stat or common law remedy & fails, he cannot resort to the other remedy upon the same process. 2 Keble 130. Salk 212 Mon 715. 2 Hawk 302. 356. Cro El 231. 367. 697: 5 Co 99.

If the statute law should enjoin a duty or forbid an offence, and should offer no punishment for a breach, the Common Law would lend its aid and punish the offender as for a misdemeanor. 19 Vin 512. 518. Cro El 655. 1 Bac 545.

As a general rule it is true, that when a statute makes that an offence, which was not so at Com Law, & points out a particular mode of prosecution, that mode only can be pursued. Salk 45. 2 Burrow 805. 834 7 Co 36c. Cow 524. 560.

But this rule must be taken in a qualified manner; When the particular mode is pointed out in the enacting ~~clause~~ or prohibitory clause, or when there is no prohibitory clause it holds good; but in other cases. 1 Bac 544. 545. 4 Co 250.

But if a Statute inflicts a punishment for any offence which was a crime at Common Law, then the prosecutor may elect to pursue the ~~stat~~ Common Law remedy, although the mode of prosecution was pointed out in the enacting ~~clause~~ or prohibitory clause. 2 Burr 799. 2 Hawk 302 2 Ala 803. 4 Jn. 202.

The word "May" in law is considered as synonymous with "Must". And all permissive terms are in effect imperative. 2 Str. 1130. 2 Hawk 263. 374.5

If a Statute inflicts an additional punishment for the ~~repeated~~ repetition of an offence the offender cannot be made to suffer the additional punishment unless the offence was committed after the conviction of the first. 1 Hawk 168. 1 Hales P.C. ~~[illegible]~~ 324. 570. 685. Dyer 328

The penal laws of one Sovereign State can never be noticed in another Sovereign State. Every community which has a sovereign unlimited power of enacting laws is a sovereign state. 3 Jn 735 17 Ala 128.

An universal or general expression, must not be construed to extend to persons who are exempted by laws of a similar operation. 19 Pick 501 1 Hawk 147. 203.

In the construction of remedial statutes courts are not bound by the letter, or to a strict construction but must govern themselves according to the intention 3 Gr 7. 1 Co 123. 11 Co 71. 3 Inst 301.

If the statute is partly penal & partly remedial the rule is, that the penal part shall be ~~strictly~~ construed ~~construed & liberally~~ & ~~in favor of~~ liberally the remedial part. Plow 36. 59. 1 Ala 88. 2 Co 215

It is said that statutes against ~~penal~~ penal ~~stricted~~ be construed liberally. This should be understood that

a qualification; so far as they tend to set aside frauds they should be construed liberally, but that part which gives to Recover the offender should be construed strictly in his favour. Plow 57. 9 Co 82 4 Bac 650.

A statute enabling all persons to dispose of property, or for punishing all persons who shall be guilty of a crime, must be intended to those persons only who were capable of disposing of property before, or were considered before capable of committing crimes. Dyer 354. 1 Vern 300 Sow Dr 141.

The rules of construction are the same in Courts of law as in Courts of equity. 1 Jac 622. 3 Ch Ca 430.

When the Common & Statute laws varying the Statute always prevails, and an old statute gives way to a new one when they are inconsistent. ~~with~~. 7 Ne Co 89. 2 Ne 630.8.

~~Who shall prosecute penal Statutes.~~

~~It is a maxim of law that wherever there is a right there is a remedy, & that the remedy ought be pursued by the person injured.~~

A statute law speaking affirmatively does not abrogate the Com Law unless it implies a negative. 1 Com 381. Co Lit 100 a 111. 115. 2 Rolle 49 19 Vinn 511.

If a statute gives a lower remedy than the Com Law, the Common Law remedy is taken away; but if it gives a higher remedy the Com Law remedy is not taken away, but either may be resorted to. 2 Com 226. 2 Rolle 49. 19 Vinn 511. 4 Com 381 a 301. Co Lit 111. 115. 4 Bac 641.

A subsequent affirmative statute concerning any thing that was not at Com Law implies a negative of all other things. 2 Show 30. Co Ch 104

The great criterion ~~to know to know~~ for ascertaining whether a subsequent statute repeals a former is ~~to~~ ~~determine~~ determined whether it was the intention of the legislature that it should; and this rule all others are intended to illustrate. Plow 232 1 Co. 73. 4 Dod & S 3.

The word "void" has caused much litigation as to its meaning. It is frequently a subject of contention whether it is to be understood as meaning "voidable" or "void". The decisions on this head have been numerous & contradictory. The true rule Mr Good appreciates by which to determine the question is by ascertaining whether the intention of the legislature would be defeated by considering it as meaning voidable, and if it would not, then that construction should be given it.

A void contract is one which is "void" from the beginning to all intents & purposes. But a "voidable" contract is good till declared otherwise. Of void acts any person can take advantage, but of voidable no person can except ~~they~~ those who are interested. 3 Co ~~4~~ 59.b 5 Co. Ed 207 1 Mod Co 87. Jac R 310.

A public offence is one against the community at large. ~~It~~

When a Stat gives two remedies, a public & a private for the same offence, the public punishment may be inflicted upon a conviction on a private prosecution without any further trial. Laws Cont. 218

When a Stat inflicts a penalty for injuring or disturbing an ~~[illegible]~~ individual rights, the person who is injured is alone entitled to prosecute; ~~not the public~~. 3 Lev 240 Co Ent.

When no particular form of action is prescribed for the recovery of a penalty, the proper one is Debt.
Pop 175. 4 Bac 653

Qui tam Actions are such as are brought by individuals, partly for themselves, & partly for the public. They derive their name from these words being included in the writ. 1 Co 65. 66a. 5 Co 48b 3 Bl Co 162. 2 Hawk 275.

A qui tam action is a thing unknown to the Common Law.

If a penal statute expressly allows a penalty to the person injured, he need not sue a qui tam action, but may bring his suit in his own name. 1 Com 224.

Qui tam actions bar public prosecutions, and public prosecutions bar qui tam actions. 1 Com Dig 224 1 Bac 41. 3 Bl Co 162.

The public may interpose its claim in a qui tam action, but not the claim of the individual who prosecutes. 2 Hawk 275. 2 Bl Co 437. 1 Co 65. 1 Bac 37.

If a qui tam suit is carried on collusively, it will not defeat the public remedy. 2 Bl Co 162.

A popular action is one which is created by a statute & which gives the penalty for an offence to any person or persons who will sue for the same. It derives its name from this circumstance. 3 Bl Co 161

When the offence is in its nature single & cannot be severed, ~~then the penalty~~, then the penalty should be also single; because, though several persons may join in committing it, it still constitutes but one offence. But when the offence is in its nature several, & then any person concerned may be separately liable to the penalty; because the crime of each is distinct from the offence of the other, & each is punishable for his own crime. 1 Salk 182. 8 Ld 406. 2 Str 712. 4 Burr 2019. Cowp 610.

The foregoing rule holds as well in qui tam, as in popular actions. Comyns 610

The Plaintiff in a popular or qui tam action is not allowed costs unless it is expressly given by Statute. But when a penalty is given for any offence against an individual, he is allowed costs. Costs at Common Law were not recoverable in any case, but were given by the Statute of Gloucester. This Statute is adopted in the State of N.Y.
Stat N.Y. 528. 1 Ra 42. 511. 514. 2 Rule 781. 2 Hawk 274 Salk 266.

It is a general rule that a Statute shall not have a retrospective operation.

If an offence is committed against a Stat which is repealed before conviction, and another is enacted to supply the place of the old one, the offender is not liable to punishment under either. 3 Ra R 451. 1 Hawk 169. Exceptions Salk 198 Dyer 27. 2d Ray 1352. 8 Mod 51. 374. 2 Str 218.

If an action or contract is ~~for~~ ~~was~~ prohibited by Statute, & a subsequent Statute makes that contract lawful, it does not legalize or render binding the contract. 17 Wl 65.

If a contract is lawful to its full extent at the time it was made, & a subsequent Statute renders it partially unlawful, Ct will presume that the part which the Stat did not affect shall be performed. 17 Mass 211.

Every Statute is in its nature repealable. 4 Inst 43.

If a Stat which repeals another Stat is repealed the former one is thereby revived. 4 Inst 325 4 Bac 638. 1 Ra 90.

If a Stat which has been repealed is ~~repealed~~ revived, the repealing Stat itself is thereby repealed. 2 Inst 686.

If the latter part of any stat is repugnant to the former, it repeals it so far as it goes. 11 Co. 63

The law however does not favor the idea of repealing stats by implication, and it is the duty of the courts to reconcile them if possible. 11 Co. 63 1 Rolle 88. 10 Mod 118.

A saving provision in the body of a stat which is totally repugnant to the stat itself, & would destroy it, is void. 1 Co 47. 1 Rl Ab. 89.

If a stat incorporates a body of men to do business & constitutes a certain number a quorum, can the majority of the quorum do business? This remains some what of a question, the weight of authorities however favor the idea that they cannot. 4 Bac 542. 3 Mod 13. 1 Rolle at 513. 10 Co 30 Vat 211.

Courts are to determine all questions which arise upon the construction of laws. Co Lit 11. 42. 3 Co 7. Vat 346. 1 Vin 87.

Certain points wherein Com & Mer: Cantile Law differ. —

It is a rule of the Com. Law that fraud in the consideration does not vitiate the contract. In Connecticut however it has been decided that a total fraud in the consideration will vitiate the contract. Roots Rep. 58. 308.

But by the Mercantile law any fraud in the consideration will vitiate the contract.

But a ~~X~~ fraud in the execution ~~of the~~ will vitiate any contract. ~~will vitiate it both at the Com & Mercantile law.~~

By the Common law, tho' it is otherwise in equity, if one of ~~two~~ several joint obligors is taken ~~& imprisoned~~ in execution & afterwards liberated, ~~neither~~ none of them can afterwards be imprisoned for that ~~same~~ debt. But by the Mercantile law you may take the execution against one or more of them. 2 Vin 235

At Common Law a consideration is necessary to the validity of every contract. But by the Mercantile law a consideration is only necessary between the immediate parties.

(1) See Abbott on Shipping on this subject page 282

It is a general rule of the Common Law that no person can be made an involuntary debtor, but this rule has its exceptions. The cases of joint obligors & of a man & wife who have been forced by the husband are instances ~~against the rule~~ of the contrary.

At Mercantile law a man may be made an involuntary debtor, as in the case of a bill of Exchange accepted for the honor of the drawer. 7 T. 20. 2 H 512. Holt 105. 1 Nolle 11. 17 H. 90.

It is a rule of the Common Law that no parole proof can be admitted to vary a written contract; instead it is to subvert an oath & out an implication of Law. But it is otherwise at the Mercantile law in the case of Policies of Insurance. Park 444. Cowper Ship 454. & also Park 405 contra Marshall 609

Of the Subject Matter of Municipal Law. —

3 Term 464. D. 119. 2 Dr. 670. 7 Dr. 440: 14 Ch. 248:
4 Burrow 2015: 2 Hen. Bla 504.

It has been holden, but is now overruled, that if a
Merchant assigns over his bills of lading to a third person
for a valuable consideration, that it would bar the
owners right to stop the goods in transitu. 2 Dr. 63. 670. 1 Ch. 133.
(1) It is a rule at common law that no person, can be
made an involuntary debtor. But this must not be
understood to extend to cases where they are joint obl.
There is one exception to this rule in the Bk. L.
At Mercantile law a man may be made an involunt.
debtor; as when one accepts a bill of exchange for the honor
of another. 1 Ter 20. 4 Dr. 512. Plot 105. 1 Bl. 11.

It is a rule at law, that no parole agreement
can vary or controul contracts. Plot 105. Plowden at
Mercantile law is the reverse of this. Bills of Exchange & Bills of Lading. Bl. 444.
Comba 454. In Policies however, the no
parole proof can be admitted to contradict the Policy,
yet there are many cases where may operate to a particular
trade controul reading the written words of a policy. Park on Insurance 405. Cowp. 609 on B. m. 609 General observat.

Having made the preceding general observat.
with regard to municipal Law, we shall now proceed
to descant more particularly upon the divisions —

The subject matter of municipal law are Rights and Wrongs.
The object of it is to protect rights, &
to avenge wrongs.

We shall first proceed to explain rights before
we descant upon the theory of wrongs.

Rights are of two kinds, of persons, & of things.
Persons contemplated in Municipal law are of two
kinds, natural & artificial.

Natural persons are men, considered as they
were formed by the god of nature free from all the
relations arising from civilized society.

Artificial persons are such as are created
by law, as corporations, societies &c. 1 Bl Co 123. 467
They are created by legislatures to maintain succession
preserve particular rights, preserve trade &c. 1 Bl Co 123. 467

Rights of natural persons are absolute or relative. Absolute rights are such as belong to persons in a state of nature, and these rights consist in natural liberty. 1 Bla. 125. ~~And their rights are~~ They are enforced as far as is consistent with civil society by municipal laws.

~~Absolute rights are the following, viz.~~ Rights of personal security, ~~viz.~~ of personal liberty, and ~~the rights of~~ private property. 1 Bla. 129. ~~The same author gives an account of these rights, than is here, see Bla &c.~~

Rights of personal security consist in the free enjoyment of life, limbs, body, health & reputation: these are all the ~~rights~~ comprised under personal security. 1 Bla. 129.

Rights of personal liberty consist in the power of loco motion, or in the power of going wherever ~~free from restraint~~. 1 Bl. 134.

Rights of ~~property~~ property consist in the free & uncontrolled power of ~~exercising & using such rights upon it~~ controlling it free from all restraint ~~it, unconstrained by any power~~, excepting ~~the laws imposed~~ what the law imposes. 1 Bl. 138. The abstract right of property is founded on natural law; the various modifications ~~are~~ to it depend on civil law. 1 Bla. 5. 5.

Relative rights are those which grow out of the relations of civil society. 1 Bl. 146.

These civil relations are ~~either~~ public & private — Of public relations see Bl. C. 146.

Private relations are ~~of two kinds~~ husband and wife, parent & child, guardian & ward & master & servant. — ~~Of Husband & Wife.~~ ~~Marriage~~ Marriage is regarded in common law merely as a civil institution. So far as it is a religious ~~institution~~ the com. law has nothing to do with it.

The requisites ~~to enable parties to enter into this contract~~ are the same as in other contracts, viz. ~~that the parties be able, willing~~ ~~actually to enter into the contract~~ ~~and that the parties can~~ ~~be willing to enter into the contract~~ actually be contract. 1 Bl. C. 433.

(1) In Monroe vs Twistleton, which was upon a
feigned issue to L. Stanley said that a wife should
not reveal matters of confidence imparted to her
by her husband. Peake L 1 174. Appendix 44.
6 East 192

For many purposes the husband & wife are considered but one person, & then the person is merged in that of the husband. 1 Bl C 422

Of the wife's property.

The rules upon this subject rest upon the principle that it is the duty of the husband to maintain his wife & children.

Personal chattels of the wife are absolutely in the husband. 1 Co Dy 555. Co Lit 351.

So also personal property which the wife acquires during coverture. 1 Co Dy 555. Salk 115

These rules only apply to such property as the husband in her own right. Co Lit 351.

Choses in action become absolutely the husband upon his reducing them to possession. 1 Bro 342. Ncw 352 & 2 Vnd 107.

As to many purposes the Husband & wife are considered as but one person. She is in those cases looked upon as ~~having~~ merged in the husband, and they are supposed to act with but one mind, which is expressed by the husband. 1 Bl Co. 422.

~~Of Feme's property.~~ The general principle upon which the law on this head is founded is the duty which is incumbent upon the husband to protect & maintain the wife.

The Husbands right to the wife's property varies according to the nature of the property.

Personal Chattels in possession vest absolutely in the husband upon marriage. And consequently as a general rule, he may dispose of them as he ~~may~~ thinks proper during life or by will. And if he dies intestate the property goes to his representative. 1 Com. Dig. 555. Co Lit 351.

~~The same rule prevails~~ Property which the wife may acquire during coverture vests in the husband. 1 Com 555. Salk 115.

If a legacy should be given to a wife during coverture & ~~she~~ should be paid ~~it~~ to her by the executor without the consent of the husband & she should squander it, ~~the husband~~ the court compel the executor to pay ~~her~~ to him the money. ~~again. to him~~. Salk. 115.

Choses must be understood as ~~being only~~ applicable to such property ~~as she has at the time of marriage, or comes into possession of in her~~ own right; for if she is administratrix, or bailee, the property so vesting in her ~~is free from the~~ does not belong to the control ~~of the~~ husband. Co Lit 351. 1 Com 556.

Choses in action are only evidence of debt & ~~of a right to recover, as notes & bonds & and not~~ property in absolute possession. The husbands right over ~~her~~ choses in action property is not ~~so~~ as complete as ~~he~~ over personal property.

~~It is a general rule~~ that the husband may dispose of the wifes choses in action at pleasure, & so soon as ~~he~~ he has reduced them into possession they become his ~~like personal property~~ absolutely. 1 Roll 342. 1 Mon 352. 2 Mu 186.

~~Some act of ownership however is necessary to reduce their property to possession. If he should die without exercising some act of ownership it will be in his hands to be represented as intestate. But the law still entitled to them either as administrator or as next of kin to the wife.~~

It is said that if the husband does not exercise some ~~dangerous~~ act of ownership upon them during their joint lives & the wife dies before them they would vest in her representatives even if not for the Stat 29 Ch 2. 2 Ch Ca 289. But all parties consider that ~~the rule would be~~ the husband would take them even that case ~~there was no stock that~~ for the Stat 29 Ch 2 which gives the husband entitled to administer on the effects of his wife. ~~But as~~ The next friend of the deceased ~~is entitled to the husband in distribution of their~~ ~~the next friend of the wife~~ by Stat 29 Ch 2 ~~he~~ is not bound to distribute the effects ~~of the deceased~~ as other administrators are. 1 Roll Abr 910. 2 Bl 505.

Tho' the husband may dispose of the choses in action of the wife during their joint lives, yet he cannot ~~devise~~ bequeath them. 6 Ves 351.

It has been ~~held~~ that if a husband ~~survive~~ ~~his wife~~ does not take out letters of administration to her choses in action ~~which he is permitted to receive~~, he is still entitled to them under the Stat of distributions as "next of kin". 3 Atk 326. 1 P Wms 381. 4 Ves 168.

It has been also ~~held~~ that even if he should be without administering ~~& administration~~ should be granted to another ~~of~~ the wife's choses in action, yet he represents them. 3 Atk 326. 1 P Wms 381.

The husband is liable to pay out ~~of the wife's~~ choses in action, ~~all her debts~~ ~~which she may have contracted~~ ~~previous to her marriage~~ 6 Ves 351.

It has been ~~held~~ that a settlement made by the husband on the wife before marriage is a purchase of her choses in action, ~~so that they belong to him in the same sense in which her choses in possession do.~~ 3 P Wms 195. 2 Ves 501.

If the husband does not reduce them into possession during the life of the wife they would vest in his personal representatives were it not for the Stat 6 Ed 2. 2 Vern 289.

Vol 4 910. Bell 35.

By wh. he is not bound to distribute her effects.

The husband cannot devise the wife's choses in action. Co Lit 351.

Even if the the husband does not administer upon the wife's effects, he is nevertheless entitled to them as next of kin. 3 Atk 526. 1 P Wm 381. 1 Wms 168

So also if he should die without having administered, her choses in action will vest in his personal representatives. 3 Atk 526. 2 P Wms 381.

The wife's choses in action are liable for his debts. Co Lit 351.

It has been decided that a settlement upon the wife previous to marriage is a purchase of her choses in action. 3 P Wm 199. 2 Vern 501.

(But to have this operation, the purchase must have been so intended. Co Lit 20a. 4 Vern 40. Atk 692. 2 Vern 64.)

(The form last under, are only in equity only)

If a judgment is recovered in an action by the husband & wife upon a chose in action of the wife's, they are joint tenants of it. 1 Mod 179. 3 K 189 (Lit 287. 1 Vern 396

Tho' the husband may discharge or release a chose in action of his wife's without a valuable consideration, yet he cannot assign them. 3 Ves 94. 2 Atk 208. 420. 3 P Wm 199.

The reason of this distinction is, that a release is an act executed & vests a present right, but an assignment is a covenant in equity & so it is inferior to the wife.

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~~By a settlement on the wife on marriage some provision made for her in lieu of her dower~~ ~~But this must be taken with this qualification viz, that the settlement is not a purchase of the wife's choses in action unless it appears that it was its intent.~~ ~~There must have been some agreement, either express or implied, that the settlement should be considered in satisfaction in lieu of her choses in action" Per Ld Eldon 20: 1 Ves 90: 1 Ves 92: 1 Ves 94. The only test of its satisfaction is a bar of equity.~~

If judgment has been recovered by the husband & wife during their joint life on a chose in action of the wife, they become joint tenants of it ~~that chose in action~~. 1 Mod 193: 2 Mod 169: 2 Ed 337: 1 Ven 396.

According to the law rule, if either survives the other judgment before collection, the whole vests accrues to the survivor by virtue of the jus accrescendi which obtains in all cases of joint tenancy.

~~It has been laid down that the husband may dispose of the joint living property of the wife's choses in action at pleasure, but he cannot make an assignment of them which will be valid~~ against, ~~the wife~~ her without a valuable consideration; but he may discharge or release them without any consideration. 2 Vern 90: 2 Atk 208. 1 Ch 120: 3 P Wms 193: 1 Ch 308.

The reason of this distinction ~~which obtains between these & a mere assignment~~ ~~is that~~ A release is an act executed & vests a right ~~in possession~~, but an assignment of a chose in action conveys a mere equity, which is inferior to the wife's equity, ~~or an equitable right to the chose in action is superior to the equitable right of a purchaser without a consideration.~~

The wife's choses in action are not liable to the husband's debts after his death, nor can they be taken in execution during their joint lives. The reason of this is that they are a species of property not liable in any case to be taken in execution.

It is said that the goods of a feme sole in the possession of another by pledge or bailment, become

on her marriage absolutely her husband, & that in ~~husband~~ may sue alone for them. ~~This has~~ ~~been questioned but probably with sufficient reason.~~ 1 Sid 172. 1 Keen 25: 1 Vern 261.

But if the personal chattles of a feme sol. had been converted by a stranger or wrong doer ~~to his~~ ~~own use~~ before marriage, the husband has no right over them further than what he has over her choses in action, for by the conversion her right is reduced to a right of action, ~~the husband & wife should therefore join in the suit in an action for damages~~. 3 Keen 631.

If The Husband's right to the wife's Chattles real

In these ~~Chattles real of the wife the husband~~ he has a more extensive ~~right~~ interest than in her choses in action.

He may dispose of them as pleases during their joint lives. 2 Ed 46: 8 Ed 418.

~~Any chattles~~ ~~not disposed of by deed or will~~ ~~the husband & wife~~ ~~are~~ liable to be taken in execution for ~~the husband's~~ debts. 1 Holt 344. 1 Keen 564 2 Terms 638: 639: 2 Ed 46: 301.

The husband however is protected of them ~~chattles real~~ ~~only~~ in the right of his wife, for they are ~~liable~~ ~~right~~ ~~subsequent~~ to her until disposed of by him. 2 Ed 301. 1 Holt 192. (1)

~~If the wife chattles real~~ The husband & wife become joint tenants of them, whilst married, so that on the death of either the whole survives to the other. 1 Atk 692. 3 P Wms 197. 2 Ed 300. 301.

~~The husband cannot devise or bequeath them, chattles real the wife~~ for before the legacy can vest in the legatee the husbands right to dispose of them will have ceased by reason of the prior accession. 8 Ed 418: 1 Keen 271.

Yet by an act executed during the coverture he may dispose of them to vest in possession after his

(1) But if the Husband charge the real ~~Chattels~~ Chattels of the wife, it shall not bind the wife if she survive him. Co Lit 351a.)

~~(1) By a stat of Mass State 7 W 1 they may alien it by joining in the deed in a manner specified in the act.~~

(2) The husband is entitled to the use of the wifes real estate during coverture. 1 Roll 347, 10 Coke 42.

By the common law he cannot even by her concurrence alien it, otherwise than by a fine or common recovery. Lit 66 q. 670. 2 Inst 515: 1 Hle 444.

But in the state of N.Y. he can in the manner stated in the act.

By a stat of 32 Hen 8, they can mortgage for their lives. 5 Coke q. Dr St 378.

The husband by granting a greater interest than he has in the estate of the wife does not thereby forfeit it. Lit Tent 1. 8. 415: Co Lit 326: 2 Inst 501: 4 Co 140

Upon the death of the wife the real estate goes to her heirs unless she has lead issue in: possible of inheriting it, in wh event the husband becomes tenant by the Curtesy of England. 1 Hle 126 Lit Tent 1. 35. 52: Co Lit 30.

If she never had not been actually seized of the estate at the time of her death the husband cannot be tenant by the Curtesy. 2 Hle 127. Co Lit 29 Incorporeal Hereditaments form an exception to this rule, for of them there cannot be an actual ~~possession~~ seizin. 2 Hle 130. Co Lit 29

In general terms the husband is entitled to be tenant by the Curtesy without having had issue.

death, ~~[illegible]~~ such a case the conveyance is deemed a present disposition to take effect in futuro. It vests a present right of future enjoyment, & in this respect it differs from a devise. Cooke [287]: 1 Rolle 344. Indeed it is worthy of remark that a man can never devise that to which his representatives after his death could not have taken. ~~in case of his dying intestate.~~

~~Chattels~~ Chattels Real ~~real of the wife~~ are not liable for the husband's debts after his decease, for as the whole interest in them accrues to the wife by the *jus accrescendi*, ~~they cannot be regarded as assets~~ 1 Rolle 349. 1 Com 565.

If a feme sole who is a joint tenant of a ~~chattel~~ real marry & then die, the whole of her joint interest will vest in her survivor & no part of it in her husband.

f. The Husband's right to the wife's real estate.

(2) ~~By this~~ The husband is entitled to the wife's real estate ~~has~~ the ~~sole~~ use, during the coverture, ~~but cannot become absolute.~~ 1 Rolle 347: 11 Coke 92.

He cannot ~~[illegible]~~ even with ~~her~~ the wife's consent alienate ~~her real property~~ otherwise than by a judicial conveyance, that is, by fine or common recovery. Lit 669. 670: 2 Inst 515: 1 Ma 444. ~~Ai~~ 3

But by 27 Hen 8. the husband & wife are allowed to make leases for 3 lives or 21 years which bind the wife after the death of her husband. 5 Coke 9: Cooke 357.

~~Yet~~ The husband granting a longer estate in the inheritance of the wife than ~~by law he is allowed to grant~~ he does not by that act forfeit her interest in the property as is the case with respect to common tenants for life. ~~The wife will be entitled to the coverture~~ ~~[illegible]~~ the coverture and as much longer as he was entitled to hold it during his life.

Litt Ten 1-8. 415: Co Lit 326: 2 Ins 681: 9 Coke 140.

On the death of the husband the wife ~~living, her~~ inheritable estate vests absolutely in her ~~&c~~. On the death of the wife ~~living the husband~~ the fee vests in her heirs, but ~~the~~ nevertheless ~~has the~~ upon the happening of certain events a life estate in the ~~property, which~~ estate is called an estate by the ~~Courtesy. The events necessary to his being entitled~~ for the ~~Courtesy are the following. If the husband~~ provided the wife ~~has~~ had issue by ~~the wife~~ her which ~~issue~~ was born alive during her life & was capable of inheriting ~~the~~ her ~~estate, he~~ becomes ~~on her death~~ tenant by the Courtesy of England of all the lands ~~&c~~ ~~by the wife~~ in fee simple or fee tail of which the ~~other~~ wife died seised. 1 Pla 126: Litt sec 1. 35. 52: Co Litt 30.

The wife must have been actually seised of the estate, otherwise the husband cannot take by the Courtesy. 2 Pla 127: Co Litt 29.

~~In this rule~~ There is an exception from the exception to this rule ~~in the case of certain~~ incorporeal hereditaments, for of these there cannot be an actual seisin. 2 Pla 128: Co Litt 29.

To entitle ~~the husband to an estate by the Courtesy~~ him to be tenant by the Courtesy, the marriage must have been legal; it is also necessary that the issue be born during the life of the mother, for if the Cesarean operation be performed after the wife's death the birth will not be such, as is worth, the husband to be tenant by the Courtesy; since at the death of the wife, he will have had no issue born, & the inheritance will rest absolutely in the heir apparent. Co Lit 29, 30: Plow 263: 8 Co 35: 2 Pla 130.

By the birth of issue living the wife, the husband is ~~by~~ entitled tenant by the Courtesy of England; at the death of the wife his right of Courtesy is consummated. Co Litt 30: 2 Pla 28: Law Gran 285.

In Gavelkind Tenures ~~the husband~~ he is entitled to be tenant by the Courtesy without ever having had issue.

(1) 11

130 p/ there is a similar statute in Wy.

(2) The husband has no interest in a contract
over property held by the wife to her sole &
separate use. — At common Law the
wife could not hold any such property.
It is now allowable in Equity & the wife may
dispose of it in any way she may think
proper unless it is real estate, in wh case
she is prohibited by that from devising it.
1 Pow Con 103: 3 Atk 393: 1 Ford 82. 90. 91. 90
152. 163: 3 Vern 748: 6 Bro P 156. 3 P Wm 337.
1 Vesey 903. 2 Ch 191. 553.

When property is conveyed to the sole &
separate use of the wife the husband cannot
by his dissent defeat the gift. 2 Lit 3.a: 1 Bac 303

Until lately it has been the custom when
property was to be conveyed to the sole & separate
use of the wife to convey it to trustees for her
use; but it is now settled that it may
be held by herself without the intervention of
trustees even when it comes from the husband.

Thursday Ogden Edwards & Ewing

The mode of proof peculiar to Chancery is by compulsory discovery. The Pltff. may appeal to Defts. conscience.

Hence it is that Ch. has concurrent jurisdiction with law in ~~[illegible]~~ actions of account.

When a discovery is made the Jud. or sentence is the same as it would be at law if the same proof could be procured.
3 Blk. Cm. 381. 2. 437. 449: 2 P. Wms. 2 Ves. 277. 638: 3 P. W. 148.

The mode of which in Eq. is conducted by interrogatories on which depositions is taken out of Court. In Com. it is viva voce. In Eq. Commissioners are appointed for the purpose.

When witnesses are about leaving the State, or are aged, or infirm, or under such circumstances as to [illegible] it probable that the testimony will be lost, then depositions de bene esse or for perpetuation of testimony are taken.
3 Blk. Cm. 382. 3. Mitf. 130.

In consequence of this power of taking depositions de bene esse the Court of Ch. obtain a power which otherwise it would not

Thus it exercises the same power as Law Courts.

The difference between the relief of Ct of Law is by Ct decreeing specifically.

If the Deft does not execute the decree he is liable to a penalty, or ~~fine~~ imprisonment.

3 Blk Cr 438. 1 Ly Cr 16. 3 PW 245. 1 PW 532. 1 Ath 413.

The principle on which this Court decrees specifically is, because this Court considers as done what ought to be done. The interest in this considered as vesting from the time it should have been executed.

In the above case the Court of Ch. are concurrent with Law, tho the mode of relief is diff. This is now as a general rule that when a specific relief can be prom relief can be obtained at Law.

Besides the mode of giving, pursuing & relief a court of Ch differs from Law in their construction of securities for money lent. This principle prevails in mortgages, & Ct allow an equity of redemption. 3 Blk Cr 454. 439. There is also another ground viz Trusts. ~~Trusts~~ Uses at Com Law, & Trusts since the Stat of Uses are now the same. 3 Blk Cr 439.

Independent of the foregoing differences there are others. Ct may abate the rigour

So also many accidents are cognizable in Courts of law — as when Deeds are lost by time or accident. So too are many mistakes as a mistake in an Accounts. Indeed the action of Indebt. assumpsit is as remedial as a bill in Eq. to recover money paid by fraud or mistake. But when there is a mistake in a written instrument Eq. alone has cognizance of it because in Eq. it is not your act & deed & Courts of law have cognizance of conditions which render the performance of contracts impossible.

Eq. is most Eq. exercise an exclusive jurisdiction. But in all cases of bailments (a species of trust) Courts of Law have jurisdiction. 2 Wh. Ch. [illegible]

Lastly. It has been said that Eq. was not bound by precedents or positive rules. This is wholly groundless. Eq. is as much bound by precedents as Courts of law. As may be seen from their Reports. Powell 112. 224. 2 Ab. Eq. 640. 1 Wh. 604.

Besides there are some peculiar & some singular decisions to by which Chancellors have always considered themselves bound to follow. Milford 4: 3 Wh. 520. 2 Vern 289. 316

The difference between the two Courts consists principally in the different modes of administering Justice. This is. 1 In the mode of proceeding

2 In the Mode of Trial 3 The Mode of Relief

This Difference is drawn by Blackstone, tho does not say these are the only particulars of difference, but only the principle. 3 Bl. 436.

At Common Law arrears of rent due to the wife while sole went not on her death survive to the husband. 4 Coke 51. Co Lit 162 a. Co. 351. 2 Bl 433.

But by the Stat 32 Hen 8th arrears of rent due to the wife while sole are given to the husband; ~~so that on the death of the wife they vest in him; & at his death they are transmissible to his legal representatives.~~ Co Lit 351. (1)

~~Rents~~ Rent ~~accruing~~ out of the wife's estate during coverture ~~is~~ goes to the survivor ~~at Common Law~~. Co Lit 162: Ante 692.

(2) ~~The~~ The husband has ~~usually the~~ no control ~~of the wife's~~ over property ~~during coverture, yet when property is held~~ by the wife to her sole & separate use the husband is not entitled to any interest in it, ~~& has no control over it~~. At Common Law the wife could not hold any property ~~to her separate use~~ in her own name. 1 Port Ca 103.

Equity allows of such property.

∴ But some ~~conveyance of property to her sole & separate use is good in Eq. Conclusion of a right in the husband; indeed when the wife has a property conveyed to her sole & separate use, she may dispose of it as if she be her may the may dispose of it ~~in~~ is personal, ~~the~~ ~~bodie & person & estate~~ ~~exceptis~~ ~~they are legend~~ ~~dest~~ land if real, he may sell by deed. 1 Ch. Cas. N. J. Ed. Hen 8th ~~his femes covert being enabled to dispose by that~~ ~~Hen 8th~~ 3 Atk 395: 1 Ch Ca 82: 90. 91. 98. 102. 103: 3 Bro Ca: 1 Ro. Ab 156: 3 P Wm 337: 1 Vesey 303 2 do 191: 663. ~~the must be understood real property.~~

It is worthy of remark that when property is conveyed to the sole & separate use of the wife, the husband cannot by his dissent defeat the gift. Whereas in common cases he may defeat all the wife's provisions. Co Lit 3a. 1 Roe 303.

Since it has been ~~holden~~ held that the wife may hold separate property, it has been the custom

Till lately has been deemed necessary to appoint trustees to hold it for her use, but it is now well settled that property may be given to the sole and separate use of the wife, even by the husband himself without the interposition of trustees.

Wifes right to the property of the Husband.

By the Stat of distributions if the husband die intestate leaving issue the widow is entitled ~~after the debts are paid~~ to one third ~~of the~~ (his) personal (after his debts are paid) estate ~~of the husband, as well in his~~ ~~absolutely & forever. ctd~~ If he leave no issue, she is entitled to one half. 2 Bac 127: 428. ~~Wms~~ 2 Ms 515:

~~At Com Law the widow~~ (By the Com Law) is entitled for ~~an estate for~~ her life to one third ~~of all the~~ ~~the~~ inheritable estate of which the husband was seized (either in fee or in tail) at any time during coverture, and which any issue that she might have had (could by possibility have inherited). Litt Tenant 36: 2 Ms 129.

The husband ~~cannot ~~ by ~~an~~ alienation ~~of his own~~ (of his own property) cannot bar the wife of her right of Dower. Litt 54 9: 2 Ms 131.

~~Indeed there is no way that a deeds does~~ ~~not by the effect bar the wife of her right of Dower except~~ ~~in the case of a~~ Judicial conveyance. Plow 515: 1 Co 104: 12 Mc 120: 2 Ms 124.

~~But by~~ But (yet) she may bar herself by joining with her husband in barring the Entail.

This latter Common Law rule does not obtain in several of the united ~~States~~, however in New York & Massachusetts, if the wife will join with the husband in the alienation of his property by deed, she will by so doing be barred of Dower.

~~On the other hand~~ If the estate is such that the wife's issue can not by any possibility ~~have~~ inherit it, she is not entitled to Dower. ~~at Com Law~~. Litt Sect 63: 2 Bl 131.

To entitle the woman to dower she must have been the actual wife of the husband at the time of his death; therefore if a woman be divorced a vinculo matrimonii she is not entitled to dower, but if the divorce be only a mensa & thoro she is not barred of it. Co Litt 32: 33: Nay 108: 9 Coke 19: Gro 64 463.

If the marriage should take place before the parties arrive at the age of consent which is 14 in males & 12 in females, & the husband should die before he attains ~~the age of 21~~ the widow is entitled to her dower provided she is above the age of 9 years. 2 Com 120: Co Litt 33a 40a 2 Bl 131: Litt 36: Co Litt 33.

~~But~~ The wife cannot be deprived of her dower merely because she is old and incapable of gestation. Co Litt 40: 1 Roll 678.

It was formerly held that the wife of an idiot was entitled to dower, but ~~[illegible]~~ was

~~The case that~~ It was not that the husband of an idiot was not entitled to the Courtesy. But now ~~it is~~ it is settled ~~established that the wife of an idiot is not~~ ~~entitled to dower.~~ ~~entitled to dower~~. Co Litt 31 2 Bla 130.

The title of the wife to dower is paramount to the claims of devisees, creditors & even mortgagees, when the mortgage is subsequent to the marriage. 10 Co 49: Co Litt 31.35: 4 Cook 64: 65.

~~A seisin in law is sufficient to entitle the wife to her right of dower. By a seisin in law is meant the right of possession, By a seisin in fact the actual possession.~~

~~It has been observed that to entitle the husband to the Courtesy, the wife must be actually seised; The reason of this difference is, that the husband has the power of reducing the seisin in law of the wife, to an actual seisin, whereas the wife has no such power when the husband is seised to law. 2 Bla 131. 195: 3 Cox 128.~~

~~The wife is not entitled to dower in the Equity of Redemption of a mortgage in fee, ~~the~~ ~~she has her dower expect~~ But in the reversion expectant on a mortgage term. The husband however is entitled to be tenant by the Courtesy to the Equity of redemption of a mortgage by the wife in fee. 2 Vk 526: 2 Ch Ca 300. Powell on Mortgages 321.~~

The wife is not entitled to Dower in an equity of Redemption of a Mortgage in fee, but the husband is entitled to be tenant by the Curtesy in the equity of Redemption. 2 Atk 526: 2 P Wms 600: or 300: Pr Ch 321.

(1) If a woman when alienating her Dower attempts to alien a greater interest than she is entitled to, she thereby forfeits her Dower. This is declared to be the law by a Stat of Glouster. But it is also the Com: Law. 2 Lit 32. 9: 2 Vla Ab 275. 130. 136: Co Lit 251

A Jointure before marriage is a bar to Dower. A settlement after the marriage is a bar to Dower provided the wife accepts it after the death of the husband. 2 Vla 137: Dyer 158: 1 Bull 373

How Dower may be Barred.

There are several ways in which the right of a wife to dower may be barred.

By Stat West 2. 13 Ed 1. ~~ch~~ elopement from the husband with an adulterer bars the right of Dower. 2 Inst 435. Co Lit 32: 1 Roll Abr 680. Law of N. 4. 50

~~By~~ Alienage ~~she~~ is a bar to ~~barring of her right of~~ dower, or rather ~~alienage she is~~ ~~prevented from having dower, because under such disqualification, she never had any, even an inchoate one therein, for her coverture is such that she cannot hold real estate.~~ 1 Bla 131. 6.

~~By~~ Treason of the husband is a bar to dower. ~~The right of the wife to dower is barred.~~ This provision of the common law being esteemed unjust was repealed by a Stat, which Stat has been itself repealed, consequently it is now as it was originally. ~~repeal the repealing of the Com Law.~~

~~In Law as reason does not cause a forfeiture of real estate, the rule does not operate.~~

~~By withholding~~ The title deeds ~~being in a~~ (by which the only evidences of the estate) from the heir, she is barred of her dower until she restores them. 9 Coke 17: 5 Co 75: 9 Bac 143. ~~This rule is not probably operative in Va, the reason of it not existing.~~ (1)

~~It is laid down that by~~ By the stat of Glocester if a wife attempts to alienate a greater estate than she is entitled to in dower, she forfeits the property. This would probably be the case were it not for that stat upon the principle that a tenant for life forfeits his estate by alienating a greater estate than he possesses. Co Lit 32. 9: 2 Bla 275. 130. 131. 136: Co Lit 25

~~By accepting~~ The wife receives a jointure before marriage in lieu of dower, the right ~~of Dower~~ to it is barred. But if the settlement is made after, ~~she has therefore~~ it is optional with the wife ~~to have~~ to take it or not. 2 Bla 137: Dyer 158: 1 Roll 773.

The wife by joining with the husband in a fine or common recovery ~~she~~ bars her right to dower. ~~is the property alienated~~. 10 Co 49: 2 Bac 134. 40.

Under the Stat Conf. a total divorce even a vinculo matrimonii, provided the wife has not been the faulty party, does not bar her dower; but it is otherwise if she is the faulty party. Tho it may be a question where the divorce is granted on the ground of fraudulent contract whether even then she would be barred of dower.

In Con when the wife is not the faulty cause of the divorce, she is also entitled to alimony, that she may be able to support herself until the assignment of her dower.

Tho' the Stat in Con uses the word divorce generally, yet Mr. Foster apprehends that its provisions do not extend to a divorce a mensa et thoro as it respects dower; but that, as at com Law, a wife divorced a mensa et thoro only, whether the faulty party or not would be entitled to her dower.

Paraphernalia.

The wife is entitled to paraphernalia out of her husband's property. This term ~~in the law~~ signifies the bearing, apparel & ornaments of the wife. It is sometimes difficult to distinguish betw. paraphernalia & property which the wife holds to her sole & separate use.

Par. may be defined to consist of such articles of property as the wife is entitled to out of the estate of her husband, over a part of which he retains the power of disposal during life, & over all of which he retains the power of preventing a disposition by her. Property which she holds

Paraphernalia signifies military bedding, & the apparel & ornaments of the wife.

The wife is entitled to paraphernalia out of her husband's estate.

The wife is also entitled to her paraphernalia, which signifies the apparel & ornaments of the wife suited to her rank & degree; & also mil. bedding. Thus the wife is entitled to over & above her dower, & preferably to all other legatees, or devisees; & her military wearing apparel she is entitled to even agt. the claim of creditors.

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(1) It is not necessary that any technical or precise words should be used to create a wife's separate property to her sole & separate use. It is sufficient if such appears to have been the intention of the parties 3 Atk 393.

Paraphernalia is of two kinds, wearing apparel & bedding & and ornaments for the person. 1 Rol Ab 911. Vern 213. 16: 2 Ba 435.6

~~To her sole & separate use, is property over which the husband has no dominion, & in which he has no right whatever. & is property which the wife holds independent of all control, & which was given to her sole and separate use.~~

~~That~~ To constitute property to be a separate, it is not necessary that any technical or precise words be used ~~to entitle her to hold the property conveyed to her sole & separate use,~~ it is sufficient if ~~such~~ it appears to have been the intention of the donor, that it should be held so. ~~&c.~~ 3 Atk. 393. 8. II

Therefore jewels or other ornaments may be given the wife by the husband in such a manner, & under such circumstances, that she will hold them to her sole & separate use, & ~~therefore~~ consequently safe from any liability to her creditors 3 Atk. 395.

But property bequeathed or devised by her ancestors, will not be holden to her sole & separate use so as to exclude her creditors.

If the husband delivers ~~articles of property as~~ ornaments to the wife, for the express purpose of being worn by her, they will be deemed paraph. & not property to her sole & separate use, consequently under certain circumstances they will be liable for his debts. 3 Atk. 394. (1)

From the above rules it is inferable, that tho' it may be difficult, yet as the incidents attending these two kinds of property are so different, it is important to distinguish between them.

Paraphanalia are of two kinds. ~~Firstly~~ The necessary apparel of the wife, & bedding; ~~Secondly~~ & Articles which she wears for the ornament of her person. 1 Bolle Ab 911. Moor 213. b: 2 Ro. 255. b.

The First species of par.ᵃ are no ways liable to be taken in execution for the Debts of the husband. And Mr. Ford apprehends that the husband cannot even sell them. 2 Bla 436: Bac 298. Peck Lect 501.

Second species of par.ᵃ the husband can ~~[illegible]~~ dispose of at pleasure during his life time, but not by will. 2 Atk 77. 217: 1 P Wm 730: 3 Atk 358. 395: 2 Bla 436. Contra Cro Eliz 243. 250: 1 Rolle 911: Lep 570.

Paraphernalia of this kind are assets in the hands of the Exec or adm.ʳ to pay ~~the~~ debts ~~of the Testator in preference~~ after all ~~the~~ other personal property ~~or~~ including legacies, exhausted, but not till then. ~~They are not liable for the debts of the deceased husband, & the~~ The claim of the wife to her par.ᵃ ~~of this kind~~ is preferable to that of a legatee to his legacy, or the claim of any volunteer whatever. Therefore legacies, or any other bequests, must be exhausted in the payment of debts before the wife's par.ᵃ can be ~~delivered~~. 2 Atk 104: 3 Atk 369: 395: 1 P Wm 730.

As specialty creditors have ~~no Lay~~ their election ~~either~~ to attain satisfaction from the personal or real fund of the deceased, ~~[illegible]~~ if they do pursue the personal fund ~~[illegible]~~ to take any part of the par.ᵃ of the widow, she will be considered in Equity as a creditor of the heir or devisee to the amount of her par.ᵃ taken by ~~the specialty creditors~~. 2 Atk 104-77. 3 Atk 369. 395: 1 P Wm 730.

But when her par.ᵃ is taken by simple contract creditors, she will have no lien in Eq. upon the lands of the heir or devisee, unless a trust has been created in them for the payment of debts — or unless some part of the personal fund has been exhausted by the specialty creditors. But in the state of N.Y. ~~the~~ I should apprehend it would be decided otherwise for her simple contract debts as against the heir or devisee.

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But if a trust have been created in lands for the payment of the husband's debts she will have a lien upon ~~that~~ it to the amount of her part taken; tho' all the personal fund & her part have been taken by simple contract creditors only. The lands are as liable for the payment of simple contract debts in such cases as for any other. 31: Ch 438: 2 Atk 5.

But if the specialty creditors first absorb all the other personal property, & simple contract creditors then take her part Mr Fonb suppose (tho' the rule in terms is not to be found in the books) that she will in Equity still be considered as creditor of the heir or devisee to the amount of her part taken, provided the specialty creditors have taken to that amount from the personal fund. If the husband keeps ~~jewels or the like~~ ornaments in his own immediate possession, ~~as if he keep them in his desk,~~ but permits the ~~occasionally~~ to wear them, they will be deemed her part, notwithstanding their being usually kept in his own immediate possession. 2 Atk 77.

If a jointure or settlement is made upon the wife before marriage, ~~or, in marriage in presence of marriage articles~~ entered into before marriage, & expressed to be in bar of all demands, it will be part of this kind. 2 Atk 642: 3 Vent 49: 58.

If the husband has pledged the part, the widow ~~or not the executor~~ after his death is entitled to redeem them; & for this purpose she is entitled to the surplus of the personal fund after payment of debts, in preference to legatees. 1 Com. 559. 3 Atk 395.

And on principle & in analogy to the rules which obtain when the part are directly taken in execution for the payment of ~~the~~ deceased ~~husbands~~ debts; the following rules with respect to her right in Equity against the heir or devisee

for the purpose of enabling her to redeem her paraphernalia must be law.

1 If the specialty creditors exhaust the personal fund, the heir or devisee will be liable to her in equity to the amount of the personal property taken, provided so much be necessary for the purpose of redeeming her par.

2 If in consequence of a part of the personal funds being taken by the specialty creditors, the remainder is exhausted by the simple contract ~~debtors~~ creditors when but for the simple contract debts there would have been a sufficiency of the personal fund remaining for the purpose of redeeming her par., still, tho' a sufficiency was left by the specialty creditors, she will stand in equity creditor of the heir or devisee, to the amount taken by the specialty creditors, if so much be necessary to enable her to redeem the paraphernalia.

3 Tho' the personal fund has been exhausted wholly by simple contract creditors, yet if the lands of the deceased are charged with the payment of his debts, the widow will still be entitled in equity to so much from the heir or devisee as will enable her to redeem, provided so much has been taken by the simple contract creditors.

The foregoing rules with respect to the heirs & devisees liability to the wife in case the par. be taken by creditors, or pledged, must be taken with this qualification, that they are thus liable to the extent of the assets which they have received from the deceased husband, beyond which they are not liable.

The wifes right to claim par. is strictly personal, therefore not transmissible to her legal representatives. 1 Cowp. 559: 9 Ves. 246.

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(1) It is objected upon the Husband & wife jointly to the annihilation or the release of the original debt, because the joint bond a debt of an higher nature than the original debt, the original debt is thereby extinguished.

— in N. Y.

In Con, Real as well as personal property is liable for the payment of all the debts of the deceased. Therefore, in analogy to the Eng law, it would seem that both the real & personal fund must be exhausted before the par.a of the widow could be subjected to the payment of debts. Also that both the real & personal fund would be liable to her, for the purpose of redeeming her par.a when pledged. This being the law, the Executor, if he should take the par.a before both the real & personal funds are exhausted, would be liable to her in trover. Or if not in trover, if the result should prove these two funds were sufficient without the par.a, she would be entitled to recover out of the Executor the amount of her par.a in an action of assumpsit.

In Con ~~also~~ by stat, of a husband should die insolvent, all necessary household goods are by the Court of probate to be ~~allotted~~ allowed to the widow ~~to the~~ in exclusion of all creditors.

Of the Husbands liability on account of the wife.

The Husband & Wife are jointly liable ~~1st For the~~ for the debts of the wife, ~~2d~~ For her torts, & in ~~2d for~~ some cases for her crimes.

~~1st Her liability for the debts of the wife.~~ The husband is liable jointly with the wife for all her debts contracted before marriage; ~~and This liability arises only~~ ~~solely from the relationship of husband & Wife,~~ & therefore as a general rule ceases with the coverture. 1 Bac 292. 3. If she die first, the debts do not survive against him; & if he die first, she & his legal representatives are liable.

But if she have been jointly sued & different recovered, the survivor is liable & not the representatives of the deceased, ~~The husband~~ upon her death before collection begins, the original debt is merged in the judgment. ~~(2) is liable to pay the judg.t~~ & not her representatives, because by the judgt, the original debt of the wife is ~~shifted upon the husband & wife jointly; & if the husband dies before the collection the wife surviving, she may~~

be compelled to satisfy ~~the judgment~~. 1 Rolle 351: 1 Equity cases Abrg. 60: Carth 30: 1 Ala 443: Cro Eliz 376: 5 Mod 186: 1 Sedg 337.

If ~~But tho'~~ the husband & wife have been jointly sued, ~~yet if the~~ the wife, before Judgt ~~recovered~~, it is a question whether the husband would be liable to the debt. ——

—— It would seem however that he would be liable, on the principle that when one has attached to himself a legal right, by bringing suit he regularly is entitled to pursue that suit upto Judgt & execn. ——

—— But it would seem on the other hand that as the reason for his being at all liable, no longer exists the action should fall with its foundation. (1)

~~The general principle upon which~~ The husband is liable in ~~is that he~~ ~~liability in the above cases, is that by the very act of marriage~~ by marriage he loses all dominion over her property, at least so far as would enable him ~~to appropriate it to the payment of her debts~~, it would be unreasonable that she should be liable alone & subject to imprisonment without her husband, when all power over the ~~property is vested in him~~ in the husband. It would also be impolitic, because the husband might in such a manner put it out of her ~~to the accomplishment~~ For this reason therefore the law makes him jointly liable with her. ~~And another reason may be given thus, that she is the servant of the husband, & therefore she is liable to all his contracts, & as he cannot apply the assets of her contracts to the payment of her debts, he ought to be liable for them.~~ Moor 468. 1 Rolle Ab 352: 8 Mod 105.

It is in consequence of this ~~general principle, viz that the want of dominion over her property, or her want of property~~ that if a civil action is brought against the husband & wife, she cannot be holden alone, or mesne process, but must be charged on entering common bail. It is laid down in some of the books, that she cannot be taken alone on a mesne process. But Mr Ford supposes the rule as above laid down is correct. Cro R 455: Sal 118: 1 Mills 164: Id 126. Ld Ray 938 & 1217.

(1) Genn. To wit this suit as well as most others by the principles of the common Law abated by the death of one of the parties.

(2) And if the Husband & wife are both taken she will be discharged on common bail upon her Husbands finding bail.

If husband & feme sole ~~be~~ sued & marry pending the suit, the plff may still proceed ~~in the suit~~ & judgt will be recovered agt her solely, & in her maiden name. Croke Jas 322: 3 Mod 414: 4 Bac 40: Esp 528.

~~As the wife when sued upon mesne process must be discharged on filing common bail, & if both husband & wife are taken on mesne process, she may be discharged on entering common bail, & he may be detained till he find special bail both for himself & wife. 2 Mod R 1372: 5 Com 194 (Cowp 1 Bac 49: 1 Esp 1 overruled)~~

But she will not ~~in the above case~~ be discharged in a summary way on filing common bail, unless her coverture is notorious. 1 G. ~~Then~~ She will not be so discharged if she have imposed on her creditor by pretending to be sole. 2 Mod R 72: 903.

But in such cases she may plead the coverture in abatement.

~~The right of the wife thus to be discharged when sued alone in a civil process holds regularly only where the arrest is on mesne process. To if the arrest be on final process, she cannot be discharged, tho' her husband cannot be found, unless there has been some collusion between him & the creditor for the purpose of ~~getting rid of her~~ imprisoning her. Then she may be discharged. 2 Sha 1102: 1237: 2 Mod R 720: 3 Wil 124: 1 Ib 149: Esp 227.~~

In Mayor Court Reports.

~~2 The husbands liability for the costs of the wife.~~

The husband ~~it~~ is in general ~~sole is jointly~~ liable with the wife for all her torts committed when sole, & for the same reason that he is for her debts. ~~contracted before marriage~~ i.e., her terms of property or her rights of control over her property, by means of which she is rendered incapable to discharge her liability without the assistance of her husband. 1 Bac 307: 6 Lit 133.

The law is the same as to his liability for her torts committed during coverture without his assent. ~~upon tort or demurrer~~. Cro Ch. 276: 2 Sha 1117: 1 Wil 149: Cro Ch. 301.

But for torts committed by her in her company he is solely liable ~~joint~~ because the law presumes that

she committed them by his command & coercion. & therefore in construction of law he ~~must be the other~~.

He ~~only is~~ was solely liable for torts committed in his absence, but by his direction. Cro Ch 184 n 254. 355 n 401: 4 Rde 28. 1 Hawkins 3. 4.

When the husband is jointly liable with the wife for her torts, his liability arises solely from the marriage relationship & therefore ceases with the coverture. Cro Ch 3/45

But in those cases wherein they were jointly liable she on the death of her husband ~~death~~ becomes solely liable. Cro Ch. 366 n 519. Palm 350.

When the husband is solely liable for the torts of the wife his liability does not arise from the relationship of marriage, but ~~upon the presumption~~ from the construction of the law that he himself was the tortious person, & therefore he continues ~~liable~~ so after her death; but on his death she does not become liable.....

~~The husband~~

~~& His liability for these crimes~~ ~~The husband~~ is the husband solely liable in cases of trespass or law theft committed by ~~his~~ the wife by his coercion or in his presence, ~~the construction of law being committed by himself~~. 1 Hale 45 1 Hawkins 4.

The same rule applies to burglary, & according to some to ~~burglary~~ robbery; but as to this point there are contradictory opinions. 1 Hawk: Vol 91: 2 Rle 28. (1)

But if the wife commit theft, or burglary, or robbery voluntarily, ~~in his presence or in his absence~~ of the husband in his absence or by the ~~husband~~ husband commanding only, not amounting to coercion, she only is liable. 1 Hawk 4. nun Dr.

As to crimes of a more atrocious nature as manslaughter, murder & treason, the wife is as much liable as if she were sole. ~~The~~ Even if they were committed in the company & by the coercion of the husband (2) The marriage subjection being in these cases no excuse, for the good of society requires, that whatever becomes of conjugal harmony or peace, all persons must abstain from crime like these. 9 Co 72: Hale 45: 5 Co 34: Cro Jac 482: 1 Hale 4.

(1) In inferior misdemeanors also, we may remark another exception; that a wife may be indicted & sit in the Pillory with her husband, for keeping a bawdy house, for this offence touching the domestic economy or government of the house, in which the wife was a principal agent; & also such an offence as the law presumes to be generally conducted by the intriguing of the wife. 4 Bl Co 29.

Christian in his notes says that in all misdemeanors it appears that the wife may be found guilty with the husband. It was said that the reason why she was excused in burglary & larceny, &c. was because she could not tell what property the husband might claim in the goods. 10 Mod 63 & 335. But the better reason seems to be, that by the antient law the husband had the benefit of the clergy, if he read, but in no case could the woman have that benefit; it would therefore have been an odious proceeding to have executed the wife, & to have disenfranchised the husband with a slight punishment: & hence this it was thought better that in such cases she should be altogether acquitted. But this reason did not apply to misdemeanors. 4 Bl Co 30. (a) (11)

(a) See 3.4.5 Hawk P.C. New Ed. — 2 post 24.

(2) May not the reason of these exceptions be that they never had the benefit of clergy extended to them.

(11) And generally a feme covert shall answer as much as if she were sole, in any offence not capital, against the Com Law & stat. & if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment; which being a proceeding founded merely on the breach of the law, the husband shall not be included in it for an offence to which in no way privy. But if the wife joins in an action for detention of a personal chattel the husband may be made a party to an action or information for the same as he may generally for any debt or damage given by the wife) and shall be liable to answer for any compensation which shall be recovered thereon. 4 Hawk P.C. New Ed.

(as another reason why he should be answerable for a personal wrong done by her it may be given that suits in personal actions are real suits, and consequently they are contained in the rule & reason of it that the husband must be sued with the wife.) See Co Lit (11)

(1) Quære — Is it of more consequence that a few abandoned people should be prevented from wrongfully allowing that such wd be the consequence of ~~[illegible]~~ releasing her from the husband's control, than that innocent persons should be prevented from their felonious depredations?

(11) In support of the assertion of Operation that the wife is alone liable for her torts ~~crimes~~ when committed solely & in conjunction with her husband when committed jointly & there are the following authorities — She may be indicted alone for a riot Dalt 409 Inspector — In selling gin against the injunctions of the Act 9 Geo 2 C 23 2 Str 1120. In drunkenness 2 Str 1120. Hob 96. 1 Sid 410. 11 Co 64. Sav 25. In being a common scold, communis litigatrix 6 Mod 213. 239. In defamatory & libelous Salk 384. In gaming. Sid 410. In a private entry 1 Hawk P C c 1 Rus 6 147. In keeping a gaming house. 10 Mod 335. Keeping a bawdy-house if the husband be not there with her. 1 Bac Abr 294. In trespass & slander Keilw 61. R Abr 251. Lew 122. — 1 Hawk P. C. c 1 Rus 4.

If the wife ~~voluntarily~~ in the absence of the husband, ~~by her own act~~, incur the penalty of a penal Stat, ~~the husband becomes~~ he is liable ~~therefore~~, & may be made a party with her in an action or information ~~to recover the penalty~~. 1 Hale P.C. 47 Hawk. c. 47 §. 10.

But if she commit the act without incurring the penalty, in his company, or by his coercion, he is himself constructively the committer, & upon solely liable ~~solely to be~~ prosecuted 1 Hale P.C. 47 i. Mirror.

Tho' a wife, knowing her husband to have committed a felony, receive, relieve, comfort, and assist him to escape from justice, it does not make her an accessary after the fact, or guilty of any crime whatever, ~~because in this case the obligation arising from the marriage state is considered superior to that which the wife owes society to aid, or at least not to prevent punishment~~. 3 Inst 108: 1 Hale 47: 1 Hawk 31: 1 Mac 47 & Ro 70. 9: 1 Hawk 31.

~~But~~ In all these cases ~~then~~ to a certain extent the wife is excused from the penalty assigned to the commission of an unlawful act, it is on the ground that ~~the law~~ requires ~~she should preserve her duty & obedience to the constituted authorities, which this~~ is of more consequence to society ~~than~~ that she should preserve her fidelity to the husband, & that the wife ~~should desist from the commission of the more~~ ~~Crime~~ offence (t) ~~2nd~~ be deterred from the commission of crime at the expence of a lesser penal. (1)

Of the Wifes power of binding herself by her ~~own~~ Contracts.

It is a general rule of the Com Law that the wife is incapable ~~to~~ binding herself by any contract, tho' in some cases she may bind her husband. 1 Co 42: 1 Roll R 347.

And indeed her contracts ~~at law~~ are regularly deemed void, as to herself, in the strict & technical sense of the terms. 2 P W 144: Salk 7: 1 Rol Abr 90-7.

Yet her leases are as to herself only void. This exception is founded ~~on the policy of the law to encourage~~ in favour of agriculture & tillage. Cro J 203: Dyer 58: 2 P W 147: 2 Ter Rep 776. 7 H 470 (Coke 3 Ber 504 note Ram)

The ~~old~~ reasons ~~& those~~ which are frequently ~~to be~~ found in the books why a feme covert is incapable ~~to~~ of binding herself by her contracts are ~~the following, viz.~~ ~~that~~ she is subject to the ~~controul~~ control & coercion of her husband; That she has no will; ~~a husband and wife having but one will between them, & that residing with the husband.~~ That she has no individuality, her ~~very~~ legal existence being as to many purposes suspended & merged in her husband during coverture. — ~~It would be paying too implicit a respect to the ancient dogs of the law to consider these objections in any other light than that of~~ These opinions are legal absurdities, contrary ~~to reason~~, to common sense & common experience. 1 Co 4. 1 Roll 18-347. (1)

~~But the true reasons why a feme covert is incapable to make binding contracts, are, Firstly. That by the marriage she is deprived of all controul over her property, & therefore the law in its humanity will not suffer her to be bound by her contracts, when she has none of the ordinary means of performance, & on non performance would be liable to be taken from the husband & imprisoned. ~~and secondly~~ ~~that~~ ~~to~~ the marital rights of the husband ~~may~~ would be invaded. When she allowed this privilege For if the law allowed her to contract, the property about which she contracted must consistently therewith be bound, & be liable to be taken in execution, which would be an infraction of one of the marital rights of the husband - viz. his usufructuary right therein, & her person also would stand as a pledge for the performance of her contracts & on non performance would be liable to be taken from the husband & subjected to imprisonment; which would be an invasion of his most important marital right, paramount to all civil considerations, viz, his right to the use of her person. 1 Blk Ma 330. 375. 6.~~

On principle therefore a feme covert whenever she has property under her control, & when it would affect the marital right of the husband, may as well bind herself by her contracts as any other person.

(1) But the true reason why a feme covert is incapable of making contracts are; That by the marriage she is divested during coverture of all property, & all the benefit of her service, and consequently would be unable to meet her engagements; & That in consequence of the marriage the Husband becomes entitled to her service & society, which he would be liable to be divested of, were she bound to answer her contracts. ~~Their consideration is of the highest ~~ consequence in law, for it universally gives the highest respect to the marital rights of the husband.~~ 1 Ves Jr 336. 375. 6.

And hence the wife is allowed ~~by~~ in charing in her property to her sole & seperate use, & may ~~incumber~~ bind herself, or rather ~~that~~ very property by her contracts. ~~to the extent of the property~~. ~~But she cannot by her contracts bind it at law~~. 1 Atk R 465: 6 Brow P C 186: 1 Hent 30. 91. 102: 2 Tuthep 695.

The reason why she is not bound at law where she is in Eq. is, that if Courts of Law recognize the contract as valid, they must also recognize all the legal incidents & consequences of a valid contract, one of which is that the person shall be subjected for the performance of the contract, ~~therefore~~ for no process can issue from a court of law against the property of the wife, which would not also go against her person; ~~& has been already remarked that the person of the wife shall not be subjected. But in Eq. her property may be bound without her person. Courts of Eq. having the power to issue decrees which act on the~~ ~~est & not the person~~. 2 Ven & Beg 190. 2 Ath 379: 1 Bro Ch 16: 1 Ven Ch 334: 2 P W 144.

It seems of late to be settled, that if property be conveyed to trustees to the sole & seperate use of the wife, she can bind that property without the intervention of the trustees unless ~~the instrument under which she holds the property~~ it is otherwise provided by the terms of the trust, ~~provided that she should not convey it unless they join in the deed with her~~. 1 Ven Ch 334.

It may be observed, that against the wife's capacity to bind her sole & seperate property in Eq., neither of the above objections to her general capacity to bind herself operates; because the rule is precisely of those cases only in which she actually possesses property, & property in which the husband has no right; for the binding that ~~which is done~~ can affect no marital right of his to her property, it cannot ~~affect his rights~~ to her person, because that is no way subjected to her contracts.

~~Notwithstanding the foregoing objections to the power of the wife to bind herself by her contracts,~~ There are some cases in which she may bind herself even at Com Law. ~~& she becomes feme sole.~~

If the husband be banished, he is considered as civiliter mortuus, ~~she therefore is a civil person of course a widow; he no longer has any right to, or control over her property, or person; and she is allowed to contract as if she were feme sole.~~ 6 Lit 152. 3: 1 Ven 104. Mon 651: 1 Powel Co 75. 6.

~~So the same reason~~ Also if the husband ~~has~~ has abjured the realm. ~~the wife is allowed to contract as if she were sole.~~ 1 Rolle Ab 400.

~~And~~ When the husband has been transported. And in a late case it ~~has been~~ ~~held~~ ~~when that~~ transportation ~~was~~ for a limited term, ~~for seven years~~ gave the wife the ~~priviledge of a feme sole.~~ Cowper 26: 1 Bac Ab 308.

~~The law is the same~~ (Qu) When the husband is an alien enemy. 1 Pow 6. 77: ~~Dame~~ 2: 1 Ken Ab 246: Sal 116: 646: 1 Powel Co 75. 6.

~~And~~ also ~~the bodies that the law in the~~ ~~case~~ where the parties are divorced a mensa et thoro. ~~only.~~ Mon 666: 1 Pow 6. 76.

~~In~~ In the case that of Corbett & Portney it ~~has~~ ~~been decided~~ was held that if the husband & wife ~~are~~ were separated under articles of agreement, the wife having a permanent separate maintenance, ~~she is held to be a feme sole as if she were feme sole.~~ ~~What is the extent of her contracts, & how far her separate maintenance extends.~~ 2 Mo 64 572: 1 Tidd 5: Selk 116: 5 Tidd 382: 8 Ve 369: 4 Esp 266: 9 East R 374: 2 Ba & P 1079: 1195.

~~The decision in many cases lawyers have been concerned at & thought since a decision upon the point has been given.~~ 8 Tidd 545.

~~Whatever reason~~ It seems that the decision in the case of Barron & Patrick may be defended without resorting to any new principles, for those on which the ~~decision in the~~ case of Lady Lanesborough & ~~that of~~ Rustrell & Brooks were made, are sufficiently broad to support it. The only difference between Lady

Lanesborough's case & the present is, that in that case Lord L. lived in Ireland & his wife in Eng. ~~In the present both the husband & wife lived in Eng.~~ This circumstance however cannot make any difference in point of principle. Bath's R. L. 24. 2 Bro. C. C. 305.

In the case of Maxwell v Brooks there is not even a circumstancial difference from the present. 1 Bro. C. C. 79. 80. 100. Neither do any of the above grounds admitted reasons why a feme covert is under a general disability to contract operate against this decision. Lady Percy when she entered into the contract in which her subsequent husband Henry Percy was made freeholder with the consent of the trustees for her sole & separate use. ~~Thus the general reason of the feme covert's incapacity to bind herself by her contracts does not in this case exist, viz. the want of property.~~ Nor was she deprived of her property by the articles of agreement which could not be rescinded by either without the consent of the other; therefore her husband had no right in the person who could be injured. — Consequently ~~that she~~ was bound by her contracts. Her person ~~subjected~~ for their performance could not affect that most important matter of right, the right of the husband in the person of the wife, for in this case the husband had already divested himself of that right & consequently no longer entitled to her earnings, the right therefore ~~apply then in the marriage~~ ~~[illegible]~~ It was not contended or adjudged ~~[illegible]~~ this case that the contracts affect any right in the husband to her property. Therefore as no right of the husband either to her person or property could be invaded by her being bound by her contracts, the reasons why she should not be bound ~~[illegible]~~ not apply to this case. Nor the wife the mistaken ~~[illegible]~~ ~~[illegible]~~ and the objection ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~ does not operate at all against this decision ~~[illegible]~~ ~~[illegible]~~

~~is suspended in the husband during coverture.~~

The reasons upon which the doctrine of merger was founded, were merely to privilege the wife & to prevent her being bound by the contracts when both her property & her person were under the control of her husband, & to prevent her from affecting the husbands property. But these reasons do not in the present case exist & therefore the doctrine itself cannot in this case be admitted as having any operation. And if the doctrine of merger were any objection to the wifes capacity to contract, it would operate equally in Eqy. as at law, and therefore would bind her binding her sole & separate property. ~~Eqy.~~ Powell however says she is allowed to bind ~~her~~ her sole and separate, in the ground of the husbands assent, which is implied from the circumstance of her freely exp all right to it. This argument, if it be any, ~~thing~~ will apply with equal force to ~~this~~ this description: For the husband ~~has~~ has given up the person of his wife, & may imply his assent to any contract by which her property is subjected. But whether the above cases be law or not, still it is better, that tho' the wife live alone under acts of separation, she cannot be sued alone, therefore cannot be bound by her contracts, if no permanent maintenance be allowed her. 2 Ath 360: 6 Ath 604: 5 Ath 682.

The coercion of the husband, which is supposed by some lawyers to be one principle ground of objection to the wifes capacity to contract (Mr. Ford approaches) is inadmissible, & if admitted would operate to invalid all those contracts which the wife makes respecting her sole & separate property. ~~& husband binding, also be void.~~ For the reason of the objection will apply as strongly to those contracts as to any other. (1)

(1) Does the circumstance of a Court of Chancery recognising a divisibility of trust upon any ground warrant us in a belief that law does?

~~(1) This reason is fallacious [illegible] Law [illegible] in [illegible] sense.~~

~~(2) The idea is a merger of the will in corporate restricted to civil cases.~~

Of Ecclesiastical Courts Power of Divorcing.

It remains a question whether a Ecclesiastical Court has the power of divorcing.

It was decided by Lyndwood, and Archbishop Stafford, that a Spiritual Court could divorce for fornication or adultery; and also that the Court could divorce for unnatural propinquity. 1 Roll Ab 301. 304 [illegible] 73.

It has also been decided that the Court divorce by his consent. 6th Ed. 219. 375

~~The ruling~~ The Law also separate personal property which the husband to his wife & separate use. 2 Vez 190. 11 75. 1 Bro 10.

Judge Story is of opinion that the Law always divorce property in which the wife has an interest. ~~The Law~~. 1 Vez 303. 518: 3 Atk 709 [illegible] 205: 1 [illegible] 126: 2 [illegible] 116. 382: 1 Ves 245. 2 [illegible] 253 Commentaries & Conflict Law 184.

If a woman separate has personal property ~~[illegible]~~ & marries her husband, it will is good. Plow 344. Atk 650

The rule is the effect of [illegible] Ecclesiastical Courts have jurisdiction the wife can divorce (that ~~[illegible]~~ it has been decided in Consistorial by the Court of Ireland, with but dissent by the Lord Chancellor, which that a foreign Court Chancery or Equity [illegible] is sufficient to the Ecclesiastical Law) Ross.

Of some Courts powers of Devising

~~It unnecessary to be discussed is, whether a wife can at Comm. Law devise of her own property which she may happen to own.~~

~~Judge Reeves conceives that she would be able to.~~ —

So far as this depends upon ~~the~~ Stat. Law it is clear. The Stat. 32 & 34 Hen 8th expressly forbids it. The Stat. adopted in the State of N. Y.

It is said that they are considered as but one, and that to suffer her to devise would destroy the legal idea of unity. —

If there is but one will, that is as much a reason for his not devising as her: or she has as good a right to the exercise of that one will as he. (1)

It is ~~also~~ said in opposition to the wife's power of devising that she has no will, ~~of her own~~, it being merged in the husband. —

~~But the law takes no cognizance~~ crimes, and no person but those who have the exercise of their faculty are capable of that: as idiots & lunatics, and it is only the malevolent exercise of the mind that the law punishes for crimes or only crimes as an illegal or malevolent intention ~~is combined with an illegal act~~. (2) Note. She can ~~therefore~~ convey ~~or~~ land with him in a fine, or common recovery. ~~what Hempe Stat. not the idea of their being but one will is not true~~. So that from these and other fictions of the like nature nothing ~~can be gathered~~ gathered.

~~Mr. Justice Reeves~~ Judge Reeves ~~conceives~~ thinks ~~to be~~ Matter Transcribing of Office ~~Their~~ ~~that whenever~~ ~~we find~~ a married woman is possessed of property, or has a right to dispose of it. & what will not ~~of devise her lands, we must~~ ~~have recourse to~~

him at her death, she may devise it ~~dispose of it in such a manner as not to interfere with any marital rights of his.~~

The reason is, that when the husband dies, the wife's life estate only will pass to the husband upon her death, that she may devise the residue. ~~upon the same principle of not interfering with the marital rights of the husband.~~

~~Thus we see~~ In opposition to this ~~idea~~ right ~~of the husband~~ it is urged that she might be coerced by the husband to devise it in an improper manner. —

For this is a just cause, and right with regard to husband, yet she can convey judicially. — The reason is not a good reason upon the ground; ~~for if it is always the case will not be secured~~ that is official operates, ~~the~~ she may ~~another secret will~~ pass power ~~of passing it~~ will always be in her power to work with made by husband.

It has been by some she could devise with his consent: ~~from~~ which it is inferred that she could not without. — It is a friendly the case (the wife then having no property) that the husband would suffer her to devise a part of his, which she could not without such consent. And so this rule is not applicable. ~~It~~ does it appear any reason that she cannot devise her own property. ~~And it was early~~ Blackstone by ~~Lynwood the constitutions of Spelman~~ a wife, paraphrase: ~~as an independent~~ of the husband, and that she might ~~rule~~ devise them. ~~So both~~ Blackstone also says ~~they, where a wife has land, that~~ she could devise her entered property. ~~Vol. 1 Bl. 441: 3 Cy. 2 Cyl. 2 Ch. 73.~~ —

a disability. She can also devise with his consent ~~if~~ as ~~therefore~~ in the instance of ~~leaving no will~~, she ~~could~~ not devise with his consent, ~~for~~ ~~that is the reason to create a will~~ does not. Bac. Ab. Ch. 21; 3 P.

A feme covert may execute a power
given her, either by her husband or any other
person, to convey ~~a dower~~ real estate.
The very act of an estate is settled to her
& trust executed that trust by way of bar.
1 Rol 329: 1 Ley 79. 191. 610: Co Lit 110: 6 Mod. 86.
356: Salk 39. 134: Doe de 190: 2 Fra 655.
The Stat of Hen 8. wh is adopted in the State
of N.Y. secures the feme dowing in any
other way. Salk 239: 1 Vern 80; Prec Ch 31. 32.

It is now settled in Eng that a woman ~~married~~ ~~have property to a be are separate use; & yet~~ ~~that she can devise~~ bequeath ~~these~~ personal property which she had at her death or intestate ~~as~~ But the expression of property ~~can~~ cannot create ~~at~~ with ~~ability~~ in the wife. 2 Vesey 190: Do 75: 1 Brown Ch 16.

As the law now stands in Eng a woman cannot devise real property in consequence of the Stat of Hen 8th.

Judge Kenner

meaning that the leading principle upon this head is that she can devise property in which her husband has no interest. 1 Vesy 303: Do 518: 3 Atk 707: Do 5: 205: 1 Ch Ca 126: 2 Do 316: Do 382: 1 Ves 245: 2 Do 253.

The choses in action of the wife are not the husbands upon her death, unless he has reduced them to possession. and then she can bequeath. 1 Mod 211: 213.

It often happens that a woman who is lunatic can hold property, and this she can devise, he having no right to it. Moore 340: 1 Atk 608: 2 912: Leonard 81.

If a woman have property ~~and~~ which it is secured to her on her marriage upon articles of agreement; she can convey it. Copelin & Corrison, 1 Ch Ca

If a woman ~~should~~ devises her real property and the husband ~~should~~ dies first, the will ought not to be good it being void post the legislation of the Stat. But if she ~~should~~ devises personal property and survive the husband, it ought to be good. The reason is that there is no Stat incapacity by Stat 9 — Moore 324: 1 Atk 675.

In Con it has been decided that a feme covert might devise. This in ~~law~~ ~~since~~ overruled by the Court of B.R.

When the ancient ~~Saxon~~ Com Law remained unaltered by the Norman innovations, the wife can devise her real property. This is the Law in Ch.

Of Marriages

~~The Common Law will first be considered and afterwards some of the alterations.~~

Mr. Dark ~~Ad~~ to what was originally necessary ~~to the~~ to constitute a marriage. ~~The completion of marriage we are very much in the dark.~~ It ~~first~~ went into the hands of the clergy ~~after~~ when the popish superstition overran England ~~and~~ Then it ~~was~~ first ~~to be~~ considered as a holy institution. The reformation did not ~~shake the idea that it was~~ lessen them of the power of marriage, it legalised ~~marriages celebrated in another~~ other marriages, ~~as the clergymen did; but it did not render void~~ ~~marriages of this kind, if celebrated in another manner,~~ ~~as if a man took a woman to be his wife in the presence of witnesses.~~ After this when the kingdom came ~~to be~~ divided ~~up~~ into different sects, they all had their own method of marriage, but ~~they all provided the method of having this~~ the clergymen appeared ~~at all of them~~. ~~but still~~ Marriages ~~between~~ were not ever to be entered into without the interference of clergymen, ~~the children being legitimate, and the marriage legal if the parties being married,~~ ~~but~~ but the parties were liable to ecclesiastical censures, ~~for such marriages by excommunication & all its attendant disabilities.~~ ~~2 The~~ The common law does not ~~make~~ ~~marriages~~ marriages contracted without clerical interference (1) 2 Lev. 35, 6: 1 Salk 120. 438; Mod 170.

~~Lord Ch.~~ Under Chr. 2 ~~that the~~ it was mooted that marriages ~~had not~~ celebrated under the protectorate by a justice of the peace (as they all were) should be good.

~~2) Their very class of things were very strict~~

Lord Ch. 5 Geo 2; it was then enacted, that all marriages should be null & void which were not celebrated by a person in orders, and further there was a requirement of the parish church. This extends to all persons

(1) Any Contract made per verba de presenti, or in words of the present time, & in case of Cohabitation per verba de futuro also, between persons able to contract, was before the last act deemed a valid marriage to many purposes; & the parties might be compelled in the Spiritual courts to celebrate it in facie ecclesiae. But these verbal contracts, are now of no force to compel a future marriage. 1 Bl Co 439. 26 Geo 2

By this same Statute all impediments arising from pre-contracts to other persons, were abolished & declared of none effect, unless they had been consummated with bodily knowledge; in which case the Canon Law holds such ~~[illegible]~~ contracts to be a marriage de facto.
1 Bl Co 435)

(2) (In the case of Bunting vs Lepingwell it was ruled ~~[illegible]~~ That when the Ecclesiastical Court avoided a marriage & compelled one of the parties to marry another person, by the first betrothing, that the issue were legitimate.
4 Co 29)

Ind jews & gentiles. But this law being done, courts modified it in such a manner as to make it operate more reasonably. They established it as a rule that if a man cohabited, and had the reputation of marriage, this was sufficient proof that it was legally celebrated in all cases, excepting ~~when a man sued for adultery, when he must prove the marriage to have been legal.~~ 4 Burrow 2057.

~~It is here necessary to give an account who may marry.~~ There is a statute which ~~It is a singular that upon this head~~ declares that any persons may marry within the levitical degrees, unless gods law forbids. ~~and yet~~

The Jews ~~have~~ have decided that gods law forbids that ~~the parties~~ men should marry ~~in the following cases.~~ ~~Where at present~~ wives, are already ~~living~~ ~~upon~~ ~~contracted~~ married, or when ~~the~~ they are ~~any~~ under age.

~~Also Rabbi Ben~~ In some states it ~~is therefore~~ necessary that the parties should be ~~of the age of nineteen which~~ is twenty one years of age in Virginia without the consent of parents or guardians, or females at twelve in females without ~~their~~ consent. ~~in perfect of the parties marriage~~ 1 Bolt 340.

~~Where the~~ Marriage ~~is a~~ previous marriage; or a pre-contract; ~~or where there is any~~ impotency and C. Marriage ~~where~~ Non age ~~the perfect of parties~~ makes it only voidable.

Affinity is as much within the levitical degrees as consanguinity.

~~We do not enter into all the cases excluded by the~~ ~~excluded by law~~ ~~by~~ ~~The levitical degrees~~ ~~are the following persons or within the~~ ~~The following~~ ~~rule must be attended to.~~

~~Lineal~~ ~~All lineal~~ All Lineal Relations; ~~are all collateral relations, being~~ collateral relations ~~excluded~~ to the third degree inclusive, are ~~prohibited by Jewish law~~ considered as within the levitical degrees.

To ascertain who are within the divisional degree from one of the parties to a marriage, ~~[illegible]~~ the other party. ~~[illegible]~~ Vaughan 308. 311: 305: 325. 218: 248: 8 Ph 228. Leaseends are within the vertical degrees. 5 Mod 168.

(17)

2. Con.

~~Where~~ ~~That~~ both the clergymen & justices are authorized ~~[illegible]~~ to marry: ~~but their jurisdiction is confined~~ within the counties in which they ~~live~~ reside. ~~[illegible]~~ The governor, lieut governor, & counsellors ~~[illegible]~~ authorized to marry throughout the state. ~~[illegible]~~ ~~the whole State.~~ That it is necessary that any person that marries a couple should ~~marry~~ first publish them ~~[illegible]~~ if they do marry ~~[illegible]~~ without ~~[illegible]~~ they are liable to a fine of twenty pounds. There is no penalty expressed to the act for persons marrying out of the county.

From this circumstance has arisen a question whether if a person is married by an officer, whose jurisdiction does not extend out of the county in which he lives, is a valid marriage. The opinion seems to be allowed that the marriage is good. ~~[illegible]~~ Means ~~[illegible]~~ Seems the marriage is good. ~~[illegible]~~ ~~be such an office there is no [illegible] that the marriage should be [illegible]~~ For if a person is not published, it is still a good marriage. From which it appears that strict compliance with the law is not necessary to the legality of a marriage. But it is a case doubtful in this case there is a special fine, & not in the other. Not even any thing is provided if they do not marry. The legislature has ~~[illegible]~~ to be its intent, the fines are imposed the penalty for a misdemeanor. In cases in point to dispute of legislatures, they may ~~[illegible]~~ make their forms, but not ~~[illegible]~~ them. ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~

(1) A prior contract in Connecticut will not avoid a marriage. Nor in relations by affinity forbidden to marry.)

(1) If the Contract of Marriage to be governed by the *Lex Loci* in the same manner as any other Civil Contract?

When a married woman had gone to France & was divorced there, & had married a French man, Parliament granted the husband a divorce, 1 Bl Cr 441.

If this divorce was an effectual dissolution, why was it necessary to apply to Parliament?)

(2) The causes for granting a divorce *a mensa et thoro*, are among others, intolerable cruelty, adultery, perpetual disease, & the like. 3 Bla 94

The effect of such a divorce is not to allow either of the parties to remarry, but is a separation from bed & board, a restriction of the liberty of the wife, a power of acquiring property by her labour, but not otherwise.

A divorce *a vinculo matrimonii* dissolves the marriage void from the beginning, & consequently bastardizes the issue. 1 Roll 357

Marriages cannot be called in question but during the joint lives of the parties. Id 360.

Children born after a divorce *a mensa et thoro* are legitimate provided cause can be proved. 1 Salk 123

Of Divorces

(1) ~~(a) And first of the Ley law.~~

There are two kinds of divorces, viz. a vinculo matrimonii & a mensa et thoro, ~~and these grounds are always for different causes.~~

The first occasions an entire dissolution of the marriage; the second only a seperation, ~~in this case they are not allowed to marry.~~

Divorces, in ley, are obtained before the Ecclesiastical Courts, and ~~the~~ upon the principle ~~of~~ that marriage & every thing appertaining to it ~~being~~ is of a holy nature.

* Divorces a vinculo matrimonii are always for causes existing previous to the marriage, ~~to such cases the marriage being considered impure.~~

Divorces a mensa et thoro are always for causes arising after the marriage.

When there is a previous marriage existing, there is no occasion for a divorce, it being void from the beginning. ~~But in the other cases they are only nullitate.~~ Co Lit 235: 6 Co R. 90.

(2) The causes for divorce a mensa et thoro are adultery, a perpetual disease, ~~intolerable cruelty, leaving poisons & in consequence of which~~ the husband ~~or~~ wife, ~~injury done to the wife~~ being convicted, ~~or~~ an attempt to commit an unnatural crime. Co Lit 162. Moore 783. ~~Divorces, either a vinculo or a mensa et thoro, amount to a seperation~~ provided & board, ~~the very of the~~ ~~Rights of the Married State recognized in law~~ deprive the husband of the right to control the wife's person, ~~& the right to the person~~, and also of the right to control, ~~& appropriate~~ & dispose property to her own ~~the property, & in any other way is the husband's.~~ All money acquired by her before it has vested, or is properly stolen to the left & depends her: she is ~~allowed allowance~~ ~~all property acquired by her by any other means~~ ~~is the husband's.~~ Moore 86.

Bl Co 94

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The effect of a divorce a vinculo matrimonii is to render void all acts from the time of the marriage, and to render the children bastards. 1 Rolle 357.

If the marriages are not preserved during the joint lives of the parties, they never can be afterwards. 1 Rolle 360.

The children issuing from parties divorced a mensa et thoro are not bastardized, but for want of access of the husband they will be considered legitimate. Bar the court will presume otherwise without such proof. 1 Salk. 123.

It is sometimes the case that application is made to parliament for divorces. And when they grant them it is to have the effect of divorces, which they sometimes do, and the children are not bastardized thereby.

Consequently divorces are granted by the general assembly, others by the Superior Court.

The Superior Court has power to grant divorces for the following causes, viz. 1st, of adultery; 2d, wilful absence for three years and other causes without proof of death; 3d, wilful absence for three years from the husband without being heard of.

All divorces so from a vinculo matrimonii yet the issue are not bastardized.

The general assembly are in the habit of granting divorces only in the cases of

Commit.

The Contract is not a ground for a divorce; Unchastity is under the head of fraudulent contract, and on the same ground a divorce is granted when any trick has been played, as was the case once before the court when a scoundrel had pretended to be the son of a great man & produced letters of recommendation. ~~He was imprisoned.~~

Alimony

In divorces a mensa et thoro both in England & Contt it is usual to allow alimony and the wife is entitled to dower if there is the family property, ~~& the~~ ~~fine~~. The Courts can if they think proper give to the wife out of the husbands estate. The assignment of dower in lands is attended with no difficulty, as being easily ascertained & fixed, & such an assignment makes a legal title to the wife; but it is more difficult in personal estates. The courts in the instances in which they have exercised the jurisdiction upon this head have assumed that the legislature in giving them the power of assigning, impliedly gave them the power of enforcing it: & as such an assignment is not in the nature of a debt, the wife not having the power of suing for it, they seized upon the husband & obliged him to pay a certain sum, & double the amount if he neglected to do it, which he did neglect to do. The court ordered the penalty to be paid, which order was confirmed by the supreme court of Errors. —

of Contract between husband & wife before Coverture.

If a bill exist prior to marriage between a husband & wife, or claimed to be treated as the marriage became the legal & contracted in the female person. 1 Vd Br 442. Br 651.

If business expenses incurred after the marriage of the husband need not be liable to pay it to the wife. Mr Ford thinks they would not, unless a pecuniary custom existed over dependent in some persons.

(A better reason than this is, that the earnings of the wife become the husband when he requires them to pay for them, and by marriage he has done so in their outfitting to pay as in particular.) 2 H Bl 10. 1 Vd Br 442: Br Ch 651.

As a consequence of the principle above stated, it follows, that if a ~~husband~~ wife be sued for debts of her husband contracted dum sola, that at law she may plead against them. 1 Hawk 93.

A distinction is to be taken between debts for which could be sued during coverture, that are to be executed till after; — the latter are not to be executed till after death in both in law & equity. Salk 3 5. 6: 1 Hawkins 93: Flet 216. Br Ch 651: 2 P Wms 242. 2 Ch Ca 480: 290: 2 Atk 67: 1 Ch 297: Salk 325: 2 Ch Ca 318: Cartt 511: 1 Ver 381.

Of Powers vested in the wife.

A feme covert may execute a power given her by her husband to dispose of estate. — If the estate is settled to uses or trusts she may execute a power to devise, but not otherwise. 1 Rolle 329: 1 Vesey 75: 191 610: 6 Co Lit 110 a: 6 Mod 161. Latch 39. 134.

A feme covert may execute a power given her by her husband to devise by way of executing a trust. Powl. Dev. 150: 2 Ven 195. She cannot devise under power from husband in any cases except these two, ~~[illegible]~~ that the Ds. ~~[illegible]~~ She may execute a power to convey by deed. See Salk 239: Noye 80. Powl. Dev. 31. 32

Of Contracts between husband and wife before coverture.

~~It is regularly true, that~~ If the husband ~~was~~ is indebted to the wife or the wife to the husband before marriage, ~~that the debts are it~~ not recoverable ~~against each other~~ after: because ~~extinguished by such intermarriage~~.

~~This rule is founded upon the reason which has been before mentioned, viz.~~ the right & duty ~~not~~ coexistent in the same person. 1 Ml Co 242: Cooke Ch. 551.

It remains ~~a question~~ whether ~~if a husband & wife~~ ~~should marry, the debt~~ ~~before intermarriage with~~ ~~a person who was his creditor~~, the debt ~~would not revive and be good~~ against his ~~heir~~ representatives. The ~~Lord~~ Chancellor says not, for it ~~the~~ is a rule of law that ~~when~~ if a right to a ~~debt~~ prosecution is once suspended it is gone forever. ~~which will~~ ~~[illegible]~~ Where the remedy only is suspended, ~~and that alone~~ it may be otherwise. 2 Ven 10: 1 Ml Co 242. & Ch. 551.

As a consequence of the first rule it follows that if ~~a person~~ a man ~~[illegible]~~ marries one of several co-obligees

he being the obligee, it extinguishes the debt as against all the other obligors. Croke Ch. 1551: 1 Ver 93.

There is a distinction to be made between such contracts as create a duty in the husband during coverture and such as do not till after coverture.

It is a clear & well established rule of Law, that covenants or promises, to leave ~~a wife or~~ an intended wife after coverture certain property, is binding; and this both at Law & equity. The reason which operates against contracts that are to be executed during coverture - to wit - that the right & duty will be executed in the same person, has no operation here; for no right vests till after his death. Salk 325: 6: 1 Vernlank 93.

Whether a bond promising to leave a wife a certain sum after marriage is binding upon the husband's heir, is a question that has been the subject of much legal contradiction. In Chg. he is unquestionably liable ~~if no assets descend to those who are bound~~ ~~it is binding~~. It is said that the heir is not liable at Law because ~~that the condition~~ ~~of~~ the bond becomes executed on the marriage, ~~which defeats the claim after his death which is in the nature of a penalty~~. Salk 216: Croke J. 571: 2 P Wm 243: 2 Ver 180: 290: 2 Atk 97: Pre Ch 237: Salk 325: 2 Roy 515: Cath 511, but it has lately been decided to be binding upon the heir at Law ~~paid at Law~~. 5 Hen 381.

A contract to accept a jointure in lieu of dower, as before observed, is not annulled by the intermarriage. Cro Lit 31: 4 Coke 1. 2.

A jointure is deemed to be a competent bar in lieu of dower.

The Eng. law on this subject originated under the Stat of uses.

Jointure

A Jointure is defined to be a competent livelihood or freehold in lieu of Dower.

(1) This cannot be done in the State of N.Y. for the
by statute
she is allowed, in conjunction with her husband
to convey away her property absolutely, much
more therefore can she be permitted to convey it
for a term of years. R. by the common law
but of a fine. —

~~The following are the requisites~~ To make a jointure binding upon the wife, it ~~it~~ must take effect immediately upon the death of the husband; it must be a competent livelihood in possession for her life; it must be made to herself directly & not to another for her use; it must be expressed to be in satisfaction of her dower. Co Lit 36: 2 Coke 3. ~~Lord~~ ~~In fee it must be a competent livelihood in possession.~~

If a jointure is settled after marriage it is optional with her to take it or not, ~~but she cannot take both.~~ 2 Ves Co 138: Dyer 358: 1 Mod 173.

~~It is the same in effect as to the dower being barred~~ If the wife accept of a device expressed to be in lieu of it, it is a bar of it. If the devised is not expressed to be in lieu of it, she is entitled to both. 4 Coke 2.5: Co Lit 36 B: L. Ray 483: Pow De 480: Co Ent 20.

Parole evidence cannot be introduced to shew that a device was intended to be in bar of dower. Pow. De 480: 1 Eq Ca Ab 219: 2 Ven 366: 1 Br P C 593.

But it is not necessary that it should be expressly ~~intended~~ to be in lieu of dower; ~~if the~~ it is sufficient if the will furnishes evidence ~~testamentary Courts evidence of the fact of such intention~~, it is sufficient. Pro 128: L. Ray 436.

~~It is likewise a just rule that~~ Marriage settlement ~~contracts~~ contents made before & in contemplation of marriage are binding in ~~Ch~~ Chancery. 1 Pro Con 424: 2 Dr 255: 2 Ven 480: 243: 2 Atk 97.

~~Some~~ Miscellaneous Rules.

If the husband and wife jointly make a base of the wife's property, she may after his death confirm or cancel it. ~~in his lifetime~~. 1 Roll 329: Hob 225. 2 Inst 673. — (1)

If an obligation is given to a husband & wife jointly, she may refuse to benefit by it upon his death, in which event it will ~~inure to the benefit of~~ his representatives, ~~as if it was given to him alone~~. 1 Rolle 349.

If a hus & wife are made tenants in common, she may ~~[illegible]~~ disagree to such a purchase or gift after his death. If it is a freehold interest, the wife cannot by a mere parol act discharge or make a waiver of it. 3 Coke 20: 1 Rolle 349. A written dissent is required by the Stat of Frauds & perjuries.

If she should accept of it, no express consent is necessary; any act which shows her intention to accept as the receiving of rents &c is sufficient.

If an ~~piece of land~~ estate is granted to a husband and wife jointly, ~~[illegible]~~ the husband cannot by his own conveyance, without joining with him his wife, dispose of the estate ~~any part of it, for the entire estate descends to both~~. 1 Com 552: 2 Fearne 29: Coke Lit 122: a b: 9 Coke 140: 2 Vern 120: ~~[illegible]~~ 5 Terms 654.

If an estate is ~~transferred~~ granted to a husband & wife & a stranger to hold as joint tenants, the hus & wife will be entitled, ~~to~~ but ~~[illegible]~~ the survivor of the stranger to the other ~~moiety~~. If ~~either~~ the hus: or wife dies, one half will go to the survivor and the other half to the grantor. Lit tent sect 291: Coke Lit 187: 8: 327: 1 Com 552.

A fine, or recovery suffered by a wife alone is good as against herself and her representatives; but the husband may rescind it ~~the conveyance~~ within during or after coverture. This is the only conveyance which the wife can make ~~alone~~ and be bound by, after the death of her husband. 1 Rolle 346: 1 Vesey 229: 1 Bacon 501.2.

If the husband join with the wife in levying a fine or suffering a recovery the fine is good to all intents

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and purposes. 1 Ventris 80: 2 Cro Eliz 74: 78: 10 Co 43.

If the wife make any other ~~than a judicial~~ conveyance, and does not expressly or impliedly confirm it after coverture, her representatives may avoid it after her death. Coke Lit 3 a.

If a wife is injured in her person or property, and by consequence an injury accrues to the husband, he ~~may~~ alone ~~sue~~ may have an action against the wrongdoer. Co Ld 80: 1: 2 Rolle 556: Cro Eli 891: 1 Lev 140: Salk 206.

The husband can maintain an action for ~~criminal~~ adultery committed with his wife. This is an action on the case. ~~In this action it is necessary~~ To support it, it is necessary to prove an actual marriage. ~~That he proves the marriage, in most cases a wife de facto is sufficient to entitle him to action.~~ ~~and has been~~. Salk 119, 8 27. 8: 4 Burrow 2057. Esp 342. Doug 162. The injury which ~~is considered to be done~~ ~~the husband and, and, without~~ is the ground of the action, is the ~~alienation~~ loss to the husband of the society & comfort of the wife. ~~wife's affections, & the disgrace accruing to the family~~. 5 Term 357.

The husband cannot maintain an action for adultery when separated under articles of agreement. 5 Term 357. ~~Lord Mansfield says as a ground of action the danger of spurious issue: But if this was the case he could never bring the action when separated for the children are presumptively his. 5 Terms 357.~~

It was formerly held that the husband might moderately correct his wife; but this is not law ~~now~~ at present. 1 Bishop 113: 116: 17 Vesch 130: 1 Bl Co 445: Mon 1: 8 Mod 22.

The husband and wife may bind each other over to keep the peace. ~~for battery~~. 1 Bishop 113: 1 Bl Co 445: 3 Hagle 433: 2 Stran 707: 2 Lev 123.

Altho' the husband cannot now beat the wife, yet he may restrain her liberty, if necessary to prevent from misconduct. Sharpe 750: 1 Bla 445:

If this right is abused by the husband, the wife ~~the proper tribunal~~ of the husband in the exercise ~~of this right, as by too long, injurious, or unreasonable confinement, she~~ may be released by Habeas Corpus. Strange 478: 1 Burr 634.

The husband & wife are justified in batteries for each other. L. Ra 62: Bro P 234: Bul NP 18: Lep 310.

If a feme sole make a will or devise & marries, ~~the will is~~ it is thereby revoked. 2 Bla 499: 2 P W 624: 4 Co 61: 2 Ven 395.

If a feme sole having made a will or devise marries & survives her husband; ~~& the testator dies~~ the will revives. Godolphin 692: Bro 321: 2 Ven 692.

As a gen. ~~the~~ the wife & husband cannot testify for ~~or~~ against each other. Coke Lit 6: 1 Bl Co 443: 4 Term 670: Co Lit 6: Bul NP 286: Lep 720.

+ The husband cannot testify against his own interest in favor of his wife. 4 Term 670: Lep 720:

Neither ~~is the husband or wife~~ are they allowed in any cases. ~~independant of interest,~~ to criminate each other. 2 Term 263: 2 L Ra 752: 7 Ray 1: 1 Hab 643.

~~Yet a~~ Yet it is a rule that a man may testify against his own interest, ~~and with the consent of the opposite party,~~ ~~or they~~ or with the consent of the opposite party, ~~are they~~ allowed to give evidence in case in which either of the parties ~~of themselves~~ ~~such their testy does not prevent~~ any concerned. ~~This rule is for the protection of domestic peace between husband & wife.~~ Holland 260. (+)

In this rule that the husband & wife may ~~not testify for nor against each other~~ however there are several exceptions. — Viz —

1. In the case of high treason, ~~the reason of this exception is said to be that~~ because the allegiance which they ~~owe~~ owe to their country, is higher than their domestic obligations. 7 Ray 1: 2 Hawk 608. Bull NP 286. But this ~~rule~~ has been questioned, see 1 Hale 301: 1 Brownlow 47: —

2. When ~~the wife exhibits a complaint against the husband or the husband against the wife for abuse,~~ is prohibited by either against the other. The complainant can testify. ~~This rule is founded on necessity, such cases not commonly happening in the presence of witnesses.~~ 1 Bro 145: 1 Hen & M 412: Bul NP 287: 1 Hen 642.

(7) As her operations with regard to an agreement that she made with her Mother.

(1) Of Joint & Several Suits.

In some cases the husband must join the wife, in some cases may, & in others must see above. The books upon this subject are very contradictory. 1 Will R 423.

In general the wife must be joined in all cases in which the cause of action would survive to her. 1 Roll 347: 1 Com Dig 571. 575: 3 Ev. 631: 1 Wms 224: 1 Ruleit 21: 1 Roll 347: 1 Com. 109 Esp 404:

5. When the husband is ~~publicly~~ prosecuted for abusing his wife she is an admissible witness ~~and for the same reason~~. Hutton 115: But this has been denied. see 7 Ray 1: & recognised 1 Sha 653: 2 Ph 308: Sep 721: — And fully recognised see 1 Bl Co 443 in the case of Jeffries mentioned in Christian's notes.

If she has been forcibly carried away ~~by a man~~ and married. But this is not strictly ~~can hardly be said to be~~ an exception, for she is not being legally his wife, the contract wanting ~~[illegible] impossible [illegible]~~ his consent. By St Hen 7 this is Felony; & it was always ~~has~~ at Com Law a high Misdemeanor. Co Lit 88: 1 Bl Co 138: Bull N P 206.

~~Nor if the first husband~~ If a man marries two wives ~~a second wife being living~~ ~~a fortiori~~ the second may destroy at will, for that ~~We see this properly an exception, the second marriage being~~ is void. Bull N P 207: Sep 721.

6th In cases between strangers the may give such testimony as will charge him civilly, ~~[illegible]~~ but not criminally. ~~[illegible]~~ 1 Sha 504.

7th Declarations ~~[illegible]~~ of the wife relative to matters which fall properly under her province ~~[illegible]~~ in suits against the husband. ~~[illegible]~~ are admissible testimony. ~~[illegible]~~ 1 Sha 527: Bull N P 287.

Civil Marital Suits.

(1) ~~Of the third [illegible] joined with the wife [illegible] alone.~~

~~In the~~ In some cases ~~where~~ the husband ~~[illegible]~~ must ~~may~~ join ~~with~~ the wife; ~~[illegible]~~ in some others he may sue alone and in others he ~~[illegible]~~ cannot join ~~[illegible]~~ must sue alone.

The books upon ~~[illegible]~~ this subject heads are very confused & [illegible]. 1 Milbourn Pract. 225.

~~1st [illegible] the wife must be joined.~~

1st In general the wife must be joined in all cases in which the right of action survives to her: 1 Roll 347: 1 Bond 571.

375: 3 Term 651: 1 Wilson 224.

The reason of this is, Most Reverend Sir

~~So generally speaking it can be ascertained~~ whether it is necessary to join the wife ~~by determining~~ whether the right of action would ~~survive~~ to her the wife. ~~But to this rule there are exceptions.~~ ~~If it were not so that the wife must be joined in an action when the rights of recovery would survive to her, the~~ husband would attach a right of recovery to himself, which would survive to his representatives: ~~to the prejudice of his wife after his death.~~ ~~That the wife would be ousted of her right to recover upon his death.~~ 1 Bulst 21: 1 Roll 347. 1 Freem 509.

When actions are brought to ~~[illegible]~~ Mr. Lyttleton thinks ~~[illegible]~~ she recover a person from the wifes estate ~~she~~ must be joined; ~~the~~ ~~[illegible]~~ ~~rule of law upon this head but this~~ it must be ~~so upon principle~~. Lyttleton 404.

In suits brought to recover the wifes chattels in action ~~of wifes while sole~~ she should be joined ~~made~~ party. There are ~~cases opposed to this~~ some contra. See Br. Ab 125: Lib 219 3 Levinz 405: Hoffman v. 1 Will 423: 1 Mod 422: 1 ~~Lutw~~ Lutw 75: 1 Comm 571: Br. Ab 537: 2 Lilly 200: 3 Term 651:

~~If an action is brought to recover~~ In actions for rent due the wife before marriage, she must be joined. 1 Roll 318: 347: 348: Br. Ab 700: Br. Ab 551. —

~~When a wife has been injured in her person~~ In an injury to the person and reputation of the wife — before coverture she must be made a party, for the action would survive to her. 3 Term 627: 1 Bac 30: 1 Roll 347. 1 Mod 422. 1 Roll R 360.

So also for an injury done to her person or reputation or property during coverture. 1 Mod 328: Br. Ab 501: 538: 600: 2 Ld Ray 128. Lib 316: (1)

The Plaintiff wife must join for ~~an~~ injuries done to the wifes land either before or during coverture. 1 Bac 572. 1 Roll 348

~~In cutting trees on the wifes land, it was said that for cutting or injuring grass, on the wifes land they must be joined~~ 1 Roll 347. 348.

(1) The wife may sue in her own name in her husbands absence beyond sea, as in case of assault &c, but she cannot be sued before he returns. ~~quere~~. 4 Vin 152.

Moor 432 Cro El 96: 2 Willm 224. ~~Ante pag~~ ~~see~~ ~~277~~ Cro El 96: 1 Comy 572. Cro El 96: 2 Will 424: 2 Vent 195.

In actions of trover brought for converting the wife's property, when she the husband must be joined. 3 Lev 631.

If the property had been lawfully taken, or found before coverture & converted after, it is ~~or~~ doubtful how it ought to be brought, ~~whether the husband, wife, or both sue~~. Salk 114: 1 Com Dig 574: 1 Leo 107: 2 Ven 261: 3 Bacon 309: Lid 102.

~~If the husband & wife~~ joint ~~in an~~ action of trover, the damages must be ~~law~~ stated to be ~~for~~ the husband ~~alone~~. Salk 114: 1 Bac 307.

The wife cannot sue alone because following ~~reasons. 1st~~ ~~The~~ the opposite party could not recover costs, she having no property; because the husband might be imprisoned, & the wife could not sue alone.

~~There is no case where she may or may not be joined, as stated above.~~

If a distress ~~is taken to compel the payment~~ of rent due the wife, she may or may not be joined, ~~If the distress is wrong~~, in an action for detinue. Cro El 549: 1 Com 574: Moor 422: 504.

In an action of debt or covenant for rent accruing out of the wife's land during coverture, the husband may ~~sue alone~~ or not be joined, the rent would accrue to the wife. Palmer 207: Sha 229: Cro Jac 624: 1 Com 573. Tho' the ~~rent~~ would accrue to the wife. 1 Com 557: Moor 887: 1 Rolle 350: Ant 692.

If a bond is given to a husband & wife during coverture, he may sue alone or join the wife; because it may be apt to the wife accepting the bond. 2 Mod 217: 1 Sha 235: 2 Vesey 676: 1 Com 574: Lev 296: Allens Rep 365: 2 Vesey 676: 7: ~~The second and second~~ ~~to the wife and both~~ ~~the husband sue alone in his disagreement to the wife's participating in the suit~~, which he can do.

If a bond be given to husband & wife admitting the husband alone may declare on it as on a bond made to himself. 2 Le. 516.

If a bond be given to the wife alone, during coverture the husband may sue ~~alone~~ in his own name or join the wife. 1 Vern 369: 3 Lev 403: 2 Vesey 677: 2 Mod 217: 1 Roll Ab 32.

If a legacy is given to the wife during coverture he may sue alone or join ~~the wife~~ her. 1 Ld R 180: 1 Com 555. 2 Rolle 134. The wife may or may not be joined at the pleasure of the husband ~~If the wife is the proximate cause of~~ in all cases in which she is the mediatorious cause of action, the ~~action as in the case of a promise made to her during coverture. She may be joined with the husband.~~ the right of action would not survive to her: ~~Tho' the right of action should not survive alone would not survive.~~ Cro Jac 77: 4 Mod 157: Barnadiston 75: Ang. 2 Williams: Cro El 61. Carth 51: Cro Jac 205.

But the husband cannot sue ~~alone~~ with the wife when she was not the mediatorious cause of action, unless the promise was express to her. Cro Jac 77. (Salk 114: here denied) Cro El 61: 2 Bla 1237.

It is not proper for the husband to join with the wife without ~~stating the wife's interest~~ or shewing that she has such an interest as to entitle her to be joined. 2 Wil R 1236.

~~3. When the wife~~ sue alone.

When the wife is merely the suffering cause of action, & the husband sues in consequence of consequential damages, she can not be joined in an action to recover those damages. These are called actions per quod. — But as before observed, this rule does not hold when the suit is in consequence of injuries sustained by the wife. 1 Levy 140: Cro El 89: 2 Rolle 556. 1 Ld 346: Cro Jac 501: 538: The reason why the husband sues alone ~~when the~~ in action ~~is~~ for consequential damages, is, that that right of action does not survive to the wife. But where the injury is to her direct the action does survive to the wife. — The action usually ~~when the~~ brought by the husband for injuries arising to him consequentially, when the wife sues for her's or in a joint suit ~~joined action accruing~~

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~~is usually stated as an action of trespass, assault, battery~~ it should be case. ~~but this is wrong, the husband not suing for the assault, but for a consequential injury.~~ 2 Ser 167: Sip 645.

If an action is brought in consequence of injuries done to the hus & wife jointly together, ~~they cannot join the offences in one declaration for~~ the injury done to the husband must be brought ~~only~~ in his name, ~~the one offered to the wife in the name of the hus & wife.~~ 1 Com 576: Co Ps 501: Co Ps 355

If the husband & wife sue for joint injuries & the jury find separate damages; the declaration may be saved by the husband's releasing his damages. 1 Ven 328: Co Ps 655: 1 Com 576.

If they are joined & the jury find for the wife, but not for the husbands, the declaration is still good, being cured by verdict. Hard 166: 2 Ven 129: Co Ps 655.

~~If one who was indebted to the wife while sole makes a promise to the hus, that if he will forbear to sue for the debt for a certain period, the debt shall be paid, the husband if he sues on the subsequent promise, must sue alone.~~ Co Ps 100: 1 Com 472. —

~~If the debt is due to the wife, the husband a debt due to the wife may sue alone, unless it appeared the debtor has promised to pay him.~~ Salk 117.

~~If the action is brought for adultery, it must be brought in the name of the husband & wife only, as the action does not survive to the wife.~~ Holt N P 27: Do 162: 4 Burrow 2527.

~~The damages given in this case depend very much upon the circumstances attending it, as from friendship, or profession, friendship, or the manner.~~ Holt N P 127: 4 Burr 651: Sip 544.

~~L. Mansfield says that the tenure of hus, can destroy the action, tho' but nominal damages will be given, & very a dust it will not be.~~

~~It has been observed that upon a personal injury done to the wife the hus & wife must both be joined.~~

~~But the~~ in an action ~~brought~~ by the Husband ~~& wife~~ the Plff recover damages for entering another house ~~& beating his wife~~, ~~the exact instance of his beating the wife~~ the Plff ~~was~~ was allowed to ~~give~~ give in evidence as aggravating circumstance, the fact of the Defts having beat his wife. ~~the damages~~. 1 Strg 61. Sep 1807.

~~When~~ An action was ~~brot~~ by the husband and wife jointly for imprisoning the wife, per quod ~~she~~ he lost ~~was not able to do~~ her work, ~~the action is brought~~ was tried good after verdict ~~in good~~ tho' exceptional before verdict. Salk 119: 6 Mo 127.

If the husband sue alone when he ought to sue with, the wife or ~~the contrary~~ join her when he ought to sue alone, ~~or it ought~~ it is unknown after verdict. 2 Mod Rep 1236: 12 Mod 320: Str 61: 229: Cro Jac 133.

On the other hand, if a wife ~~bring an action~~ sue alone ~~when she ought to join or it is necessary for~~ to do so, the Deft can only ~~plead~~ take advantage of it in the abate ment, not bar, nor can he ~~therefore~~ ~~take advantage of it~~: 3 Ves 627: 2 Lutw 1642: 1 Com Dig 163.

Joining Husband & Wife in Suits Agt. Him & Wife

~~When the husband & wife must be sued jointly & separately.~~

The wife must be joined in all cases where the cause of action would survive agt ~~the wife~~ her. Cro Eliz 591: Cro Car 196.

In action for debt due by the wife before marriage she must be joined, ~~as Defts with the husband~~. 3 Mod 186: 1 Vent 48: Moor 761: 1 Mod 351: 5 Ken 148:

~~The reason for this procedure is that the husband dead, the cause of action, must remain with the feme. If the husband represents against the cause in her representatives.~~

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The wife must be joined with the husband in an ~~If an~~ action be brought in consequence for ~~if~~ a tort, committed by the wife while sole. ~~she must be joined~~ Co Lit 133: 1 Com 375.

~~If an action is brought for a tort~~ and the wife sole. ~~she must be joined with the husband.~~

~~If~~ And as a general rule, ~~whenever an action is to be brought, for which the wife was liable before coverture~~ she must be joined with the husband in all actions for injuries done by her previous to her coverture. Co Lit 133: 1 Bac 317.

~~If~~ A tort committed by the wife ~~while covert committed a tort alone~~, without the knowledge of the husband, she must be made a party with the husband. Co Ch 301: 1 Mill 143: 1 Com 375.

~~If~~ In an action ~~is brought~~ for rent accruing during coverture on a lease to the husband & wife, she must be joined, because if she survive she may implead it. 1 Com 576. 1 Roll 340: 1 Bac 337.

As a general rule it is seen that when an action would not lie against the wife, she must not be joined.

If the husband & wife join in making a promise, an action for the fulfillment of it must be brought against the husband alone. Per the Justices as far as ~~concerned~~ by the wife ~~and~~ bond. Palm 313.

If a husband & wife jointly commit a battery, or other injury, he alone is ~~liable to be stigmatized for the conduct of his wife.~~ answerable.

~~If~~ And if the ~~also~~ commits the battery alone but must be his wife. 1 Roll 348: Palm 45: Co Ch 104: 2 254: 2 355: 401: 5 Com 104: 4 Mod 160: 1 Mill 6.

It has indeed been holden that if an action be brought against ~~both husband & wife, charging a~~ for a tort committed by both, & the husband ~~be~~ is found not guilty & the wife guilty, the declaration is totally bad. For the it appears from the finding of the jury that the wrong was committed by the wife alone, in which case ~~husband & wife~~ plus ought ~~to be~~ to have been joined, yet ~~husband~~ the should be joined in such cases only for conformity. This may appear to be in contradiction to ~~a form~~ the rule ~~that when the wife commits~~ a battery ~~alone without the privity & consent of the~~ ~~husband~~ the husband must be joined ~~with her~~ for a battery committed by the wife without his privity & consent ~~ought to be declared. That when the~~ husband is made defdt. for the tort of his wife, it should so appear in the declaration. Bythe 106. Brooms 209. 1 Com. ~~Dig. 1 Dent~~ 33. (1)

~~If~~ In an action of trover ~~be brought~~ against ~~the~~ a hus. & wife ~~for a conversion~~, the conversion must be laid to have been for the use of the husband. ~~Not of the wife~~, ~~for at law the wife can have no personal property & a conversion by her is, of course, therefore to the use of the husband.~~ Bro J. 657. 1 Roll. 6. 5 Bore 194.

If the wife ~~be~~ is joined or not ~~in the action~~ sued in respect ~~of the tort~~ ~~the tort may be taken advantage of by the plea in abatement~~ ~~or if she be not joined when she ought to be, the suit may be abated, & it is also a ground for~~ a motion in arrest of judgment, ~~& also for~~ a writ of Error. Bythe 106.

~~It is a general rule that wherever~~ When the wife is sued alone, she cannot plead alone because she cannot appear by Attorney. Bro J. 239. Lip 318. —

(1) If the husband & wife are sued jointly for a tort & the husband is acquitted but not the wife, the judgment is bad; for when the husband is joined for the delict of another, it must be approved by the judgment. Yelv. 106 Moore 201. 1 Lev. 54. 1 Vent 93

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If a wife convey her lands by fine, or common recovery, the conveyance is binding upon her because she is estopped by the record from saying that she is a feme sole. ~~It is appearing upon record~~. But her husband may at any time during her life, (or after her death if in it then case by the contrary) defeat the conveyance by a writ of Error Coram Vobis ~~or after her death if he be entitled to the lands by the survey~~. But ~~the feme covert~~ she is not estopped ~~to deny~~ by the record from saying that she was ~~upon which her wife appears~~ a feme sole. 7 Coke 8: Co Lit 46: 10 Co 43: Hob 228: 3 Bro Cha 380.

It has as a precedent cannot be created to commence in future, & as the husband has the control of all her personal property, she can dispose of no property by any executed deed during coverture, except property which she holds to her sole & separate use.

If the wife having separate property, permits her husband to receive the rents & profits ~~thereof~~ if it be real, or the interest if it be personal, she will have no claim upon him therefor, because they will presume that ~~she~~ such ~~can be have~~ abandoned them to him. ~~The~~ But this presumption ~~however~~, like other equitable ones, may be rebutted by parole proof. 1 Atk. 269: 1 P Wm 82: 1 Pow. 6 422. 3.

The husband cannot prevent his wife from taking property ~~conveyed~~ to her sole & separate use, nor ~~such as she is entitled to~~ by descent. Therefore in ~~these~~ such cases, the wife has capacity to do a binding act. Co Lit. 350: 2 Bla 292: 1 Coms 556.

If the husband neither assent nor dissent to a purchase by the wife, it is good during coverture, but on his death she may at her election either retify or annul it. 1 Roll Ab 349.

And the ~~husband~~ to assent to the purchase it will bind her only during the coverture, ~~for on his death it will again be at her election after the coverture ceases, she or her representatives either to annul or ratify it: and if she die without having either annulled, or ratified it, it will be at the election of her representatives, either to confirm or avoid it. The purchase.~~ So Lit 3 a

~~It~~ Con a grant may be granted to commence in future, provided the first grantee is ~~not~~ ~~person~~ in esse, or the immediate descendent of such person. Mat Con 24. It may therefore be a question in Con, whether a wife may not convey her real estate to commence after the determination of her husbands interest therein? On original principles the clearly may. It is very doubtful however whether our courts would sanction such conveyance. But however that may be, it has been settled, that a wife in Con, has power to devise her real property.

Of the ~~power of the~~ Wife's ~~to bind the~~ power ~~husband by her~~ contracts.

~~This power of the wife to bind the Husband by her contracts,~~ is said to be founded ~~altogether~~ on his assent either expressed or implied. 6 Mod 234: 1 Bac 296. 2 1 Rolle Ab 351: Salk 110: 4 Bla 430: 1 Com: 567: 4 Co 42: 1 Ld 109.

The ground ~~of assent~~ however, thus abundantly supposed by authorities, seems rather too narrow to support every case of his liability. For ~~one example~~ example, if the husband turn the wife out of doors & refuse to furnish her with necessaries, ~~& proclaim that refusal either formally a specially,~~ still he is liable for her contracts for necessaries. Salk 124. 1 Bla 442: 1 Rolle 351: Salk 110: 1 Ld 120: 12 Mod 244: Bul NP 196. Cha 1274: 1 Vin Bla 340: 4 Burr 2120.

~~This obligation is the case~~ In this

~~It would seem that in the above~~ case, the only rational ground on which ~~it could be made liable~~ to place his liability, is that of marital duty. ~~For the presumption of his assent is to be rebutted by his express dissent.~~

Yet in this very case it is said, that his liability is grounded on his ~~implied assent~~ presumed assent. ~~which is presumed from the fact of its being his duty to provide her with necessaries. That the presumption shall not be rebutted by the fact of his actual dissent to be liable for them~~ Salk 118: 6 Mod 239.

By necessaries are meant, food, Physick, apparel ~~&c~~ suitable to the rank of life which the husband sustains.

If the infant husband is bound to pay for the necessaries furnished of his wife; for in construction of Law, they are his own necessaries. Sho 168: 1 Ford 67.

The husband can never be made liable for the contracts of the wife but on one of these grounds, viz, marital Duty or assent express or implied. It is rational to suppose the ground of his liability to be that of implied assent, in all those cases where he has power to discharge himself by his dissent, but does not; & also in all other cases where he is liable & did not dissent to become so, tho' his dissent would not have prevented his liability. But whenever in such case he did dissent, he can be rationally supposed liable on no other ground than that of marital duty.

The husband is bound by the ~~contracts of the~~ wife in the ~~four~~ following ~~classes of~~ cases viz 1st Where he expressly assents to the contract before it is made. 1 Ala 429: 4 Mass 109: 1 Comm 567. 2d Where he expressly assents to the contract after it is made. 3d When she usually provides the family with necessaries & the husband has made a practice of ratifying her contracts for them, ~~or discharging them by payment~~ 1 Ala 430: 1 Ld 128: 1 Comm 566. 4th and Lastly. ~~The~~ necessaries ~~provided~~ purchased by her ~~same~~ for his use, or for that of his family. ~~but is constructively the same~~ Ld 120: 1 Comm 567.

In all these cases the husband may ~~not be considered bound on the ground of~~ ~~general agent~~ assent, is liable on the same principle, ~~a Master is liable~~ that a principal is for the acts or contracts of his ~~servants~~ agent, the wife in these cases acting merely as agent of the husband. Tho in the 4th class of cases he might also be considered liable on the ground of ~~duty~~. 1 Ld Ent 155: Spa 1244: 1 Lid 106.

~~A general credit given by the husband to the wife~~ If the husband gives his wife a general credit, he can only discharge it by giving a particular order ~~to the husband, cannot be determined by any~~ prohibition to all who have trusted her in virtue of it, ~~of a private nature so as to defeat the claim of any subsequent creditor who has trusted her on the faith of that credit. Such~~ cases standing on the general principle of law respecting a Master & Servant. 1 Bla 430, Ld Ray 224: 1 Show 95.

~~If the wife on having a general credit purchase goods that might be deemed necessaries yet do not use them, but~~ pawn them, the husband is not liable. ~~for them, for they do not come to his use or to that of her family.~~ Nor if she ~~have~~ pest neg them, the law is stringent. ~~still liable, tho she afterwards redeem them.~~ Sal 118: 2 Ld Ray 1006. Sep 125: 1 Bac 300.

~~The husband is not liable for money borrowed by the wife for the purpose of redeeming pledged clothes either after or before they have been taken, tho even money borrowed from, to which purpose the money is applied by him.~~ Still the husband is not liable. ~~for the contract for the money.~~ Sep 125: 2 Show 202: 1 Bla 430: 10 M 193.

If a man cohabits with a woman, & allows her to assume his name & appear as his wife, he is liable for her necessaries according to the foregoing rules. ~~Quere is an action on a contract for~~

If a man suffers a woman to appear ~~in the world~~ as his wife, ~~a plea that the deft has never married~~ he is as much liable to the creditor as if she were his wife in fact. ~~is bad, because it is sufficient to make him liable that he was a husband de facto.~~ Bull N P 136, Sep 124.

If ~~the~~ husband & wife part by agreement & he allows her a separate maintenance, he is not ~~bound~~ liable for her necessaries ~~after~~ after the separation has become ~~the~~ generally known when they ~~lived~~ lived. Salk 116: Ld Ray 444: 1006: 6 Mod 147. 12 Ad 448.

~~If the husband, notwithstanding the separation, is liable for her contracts for necessaries made before the fact of separation is generally known.~~

(1) If the Argument was with an Adultress ~~the Law~~ he is in is not liable, ~~was proper notice~~, but if ~~upon~~ it was not with an Adultress he is liable till it is generally known in the place where they ~~live~~ resided. 1 Lev 5. 1 Mod 42 Salk 119. ~~Stra~~ 647. 706. 12 Mod 244. 2 Ld Ra 444. Bull 125. 1 Ld Ra 340.

1. ~~Tho~~ separation without a maintenance does not discharge his liability for her necessaries. ~~even after the fact of separation known.~~ 6 Term Rep 654: Ld 126, 7.

If the wife elope with an adulterer, the husband is clearly not liable for her necessaries, after her elopement becomes notorious, & according to the course of authorities he is not before it becomes so (1) 1 Lev 5: 1 Sta 442: Salk 119: Sho 647: 706: 12 Mod 4. Ld Ray 444: Esp 125: 1 Ves Jr 148.

(1) According to some late authorities ~~if the wife elopes~~ it is ~~a matter~~ of no consequence whether that elopement be (was) with an adulterer or not. 1 Pow Cont 56. 1 Esp 575. Salk 118.

But tho' the husband is not liable in case of elopement for his wife's necessaries, still the wife does not become liable, so that whoever trusts her does it at ~~her~~ his peril. 1 Sta 1079: 1 Pow Cont 56: Sho 575.

1 Term Rep 547. Esp 525.

When the husband & wife are separate under articles of agreement, & the husband ~~continues liable for her necessaries~~ liability for (notwithstanding) the articles in his action against the husband cannot state that he delivered the articles to him, but must state this specially. ~~all the facts on which the husband's liability is founded.~~ 1 Sho 127.

If the husband provide the wife with necessaries he is not liable for her contracts for them, ~~the creditor bound him by any contract,~~ & tho' the purchase those articles which fall under the description of necessaries they will not be sued for her, & the husband will not be bound by her contracts for them, ~~and by any application to the contrary for the purpose he can prove he credit by permitting her to purchase the articles herself.~~ & he may retract that credit by a general prohibition; or by a special one to particular persons. 1 Lev 5: 1 Sid 109: Salk 118: Ld Ray 444.

But tho' the husband ~~when he does~~ provide the wife with necessaries may prevent her ~~from pledging his credit~~ by any contract, yet if he does not provide ~~them~~ he cannot, by any prohibition, general, or special, prevent her from binding him for them. 1 Sho 122. Esp 97. Salk 118.

If a wife elope not with an adulterer, & refuse to return a husband who does, but not with an adulterer, but is supported by the husband, he again becomes liable for her necessaries. Sho 675: Esp 125. 1 Com Dig 568.

But in ~~such~~ this case he could prevent himself from borrowing ~~her~~ liability by a special prohibition, but not by a general one. He is allowed to avail himself of his special prohibition, as a punishment of her misconduct in eloping from him. Sho 75, Esp 125: 1 Lev 4: 1 Mod 124: 4 Burr 2171.

This is laid down in Salkeld 119. That he is not bound for her necessaries unless he receive her on return, whether her elopement was with an ~~be~~ adulterer ~~or~~ or not.

~~But when her elopement was with an ~~is~~ adulterer it is clear he is not bound for her necessaries, unless he receive her tho' she do offer to return.~~

As the husband is in all events liable for the wife's necessaries if he run away, it would also seem, that his liability would be the same, if she left his house ~~because of~~ in consequence of his abuse. Vill the st mere. 2 Esp 214: 12 Mod 242.

It is laid down by Holt that a man by turning his wife out of doors ~~the husband~~ gives her a general credit with the public.

~~The husband is never bound for more~~ The wife ~~to~~ make her to provide necessaries, ~~than for necessaries, & that only in charity~~. ~~Salk 279.~~ The husband is liable in Chancery, provided ~~the~~ it is appropriated for that purpose. 1 P Wm 483: Peb 502. Salk 279.

Of Contracts ~~of the wife~~ made with the wife when sole which are fraudulent against the husband.

A voluntary conveyance ~~made~~ by the wife of her property before marriage, is sometimes deemed fraudulent as against the husband after marriage. As if a feme sole on the point of marriage convey the property without any consideration to a stranger. 2 Vez 269: 1 Vent 159.

But if a woman in contemplation of marriage ~~should~~ by a conveyance of her property, make a provision for her children by a former husband, it would be valid, against the husband, it being founded on a good consideration. 1 Ven 208: 2 P Wm 358: Salk 265. Coolpen 705.

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(1) The true reason of this is that ~~[illegible]~~ Shewing the
Angles & Entry points meet in the same point. Lab. 326

It has also been held that private settlements made by a woman on the point of marriage, to her sole & seperate use, is fraudulent against her husband. 1 Ves 19: 2 Pr Wms 535. If a woman has made a ~~[illegible]~~ ~~So it has also been held if a woman has a term~~ term to her sole & seperate use, her interest in the term will on her marriage vest in her husband. 1 Ves 7. 18: 2 Ves 290: 2 Atk 420.

These two last cases are overruled, or at least shaken by the decision in 2 Bro Ch 245.

Of Contracts between Hus: & Wife

It is a general rule ~~at the common law~~ of the that all contracts between husband & wife are void; that all contracts made previous to marriage are dissolved, ~~or nullified~~ but. Coke Lit 112: 264: Cooke Ch: 561. 1 Ble 442. (1)

~~The reason given is that the legal existence of the wife is merged. 1 Ble Co 442.~~ This reason appears to be erroneous; for if the rule was just the exceptions would be at least consonant to the spirit tho' not the reason whereas they oppose it. The true reason is that if the contract remained good, the right & duty would remain executed in the same person. Salk 326.

It is a general rule that all contracts made by the wife during coverture are void. By the old Com Law no contract between husband & wife about personal property is valid. For by the Com Law ~~the wife has no right to hold personal property.~~ Cooks Bankrupt Law 25: 1 Ves 9: 17 Wm 326: 345: 1 Bro Ch 24.

A deed of land from the husband to the wife is void. Coke Lit 3 a note 1st 112: 4 Coke 29: 1 Bro 24.

But notwithstanding the general rule it is now settled in Eng, that the husband may settle property on his wife to her sole & seperate use during coverture. And when the wife has such property, she may make any agreement or contract about ~~this property~~ it. ~~This rule is not inconsistent with the reason laid down~~

That a contract made between the husband and wife, is one where the right & duty is concentrated in the same person, 6 Br P C. 156: 2 Ves 64: 10 Mk 270: 1 P W 126: 1 Vesey 162: 2 D. 669: 1911 n. 2 not.

And in conveyances at com Law a conveyance to a person for the use of the wife is good. 4 Coke 29. Co Lit 3d a. note 1.112. Consequently since the stat of uses the husband may make at com Law a verbal conveyance directly to the wife; for by that stat a use estate passes directly to the person entitled to them. 2 Bla 332 & 3.

And if the husband to encourage industry in the wife allow her a certain portion of his earnings, Ch. will compel him to perform it. 3 P W 337.

The husband may at Com Law ~~& Chancery~~ make the wife a donation in contemplation of death, which is good if he dies, of the donee if she survives him; ~~this is rather testamentary than not executed~~. 1 P W. 441. Co Lit 3d a note 1. —

If a husband covenant with his wife not to intermeddle with her estate, he is estopped or prevented. And she may under such circumstances dispose of it as the law permits. ~~not devise her property for the law will not permit~~. If the husband interferes she may obtain an injunction against him ~~to prevent his interference~~. 1 Ch R: 324. 341. 350.

Articles of agreement between ~~as before~~ observed to live separate during life ~~as good~~, ~~these are binding to the extent of the agreement contained no further, both in Law & Equity~~. 2 Bro Ch 373: 3 Bro Ch 614: 1 Bl & Ba 351: 1 Ves 5.

If after such agreement he should ~~exercise any right over her person, for instance, after cover as they that he could not. Com Law Courts would upon a~~ Habeas Corpus, ~~& Chancery would also retrieve her~~ 1 Bro 542. Property falling to the wife after separation ~~If property~~ should come to the wife after an agreement to live separate, it would vest in the husband, ~~the agreement extending to nothing but what is comprised in it~~. Bro C. Corbett & Poland.

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(1) Lord Kenyon. Was of opinion that Infants are liable to actions ex delicto, but not to actions ex contractu, unless they arise from fraud: — and that this liability extends to the ~~rule applies to~~ grounds of action arising ex delicto, altho' the form ~~of action is not~~ ~~as~~ ex contractu. 1 Esp. 172 Whistow vs Lepman)

Of Parent & Child and Guardian & Ward

Of a Minor's power to Contract.

All persons are minors till they arrive at years of age, though ~~the age of twenty-one, and then they arrive at what is called full age~~. ~~The~~ for some purposes they are of age before that period, ~~and~~ ~~the general speaking it is otherwise~~.

~~All they arrive at the age of twenty-one~~ that time their parents are entitled to their services. ~~The~~ ~~It is a general rule that~~ that a female is entitled to her services at eighteen, ~~yet it is not a general rule~~ but that is not the fact.

A minor ~~as before observed is~~ generally speaking is not bound by his contracts ~~generally, and this whether fair or not. #~~ This rule is founded in the ~~principle~~ protection ~~of the principle~~ and it ~~that~~ ~~of deriving opinions from inexperience~~. ~~and so it~~ ~~cannot be to the art. 1 of Minor not extend to protect him in using it as a defence in an action~~ (1)

A minor is liable for contracts for necessaries; by which is meant ~~those for which he could bind himself, or contracts for necessaries he performed~~ food, ~~raiment~~, drink, clothing, instruction & physic. The articles ~~Minor~~ ~~the bound in no other cases than these, and not always for these. The articles must not only be necessaries, but ~~must be necessary for him~~ it must be necessary for him ~~for them~~.

When he is under the immediate protection & providential care & guardianship of a father, or parent, or guardian, he can not bind himself ~~for them~~. But ~~when~~ if a minor is not in the ~~he is at a distance from them, or when~~ their protection, or is not properly cared for, ~~he may bind himself for them~~.

Minors can only be bound to pay reasonable wages, and let the people be as abusive as they may, yet they are not bound by that, that the [illegible] of their [illegible] It is a matter of [illegible] and [illegible] liability, to have agreed to pay.

If a person give a bond for necessaries it is void, but if he pay, sale it is good for. The [illegible] consideration [illegible] a bond can not be impeached [illegible] all these obligations [illegible] are void [illegible] At least as one [illegible] is for [illegible] bond. A Bill of Sale any given by a person is also void, [illegible] the same principle by the same reason.

An infant is not bound [illegible] insimul computasset, [illegible] [illegible] This and [illegible] when [illegible] The [illegible] could not be imparled [illegible] and then it was [illegible] to the book. There is another reason [illegible] given in their [illegible] the books as a reason for this [illegible] being [illegible] that he is not of a capacity to contract [illegible] II Ryan: [illegible] according to their reason they [illegible] [illegible] a bond [illegible].

An infant is bound by a single bill, for. This is a contract the consideration of which cannot be looked into. [illegible] therefore [illegible] an exception in the [illegible] upon which [illegible] [illegible] be proved they [illegible] [illegible] for. There was a time when [illegible] consideration [illegible] could be imparled [illegible], and then the rule was made. But the reason [illegible] has [illegible] ceased [illegible] the rule [illegible] [illegible] might alert [illegible] time is [illegible] authority that [illegible] would bind [illegible] such a person. [illegible] laid down: 6 Co 72: 1 Roll 729: Latch 187: 8 Co 120: 1 Co 99: 1 [illegible] time [illegible] [illegible] the [illegible] of [illegible] [illegible].

(1) When sent down by an infant after his discovery of the tortious conduct, the appointment of his prior contract, or receiving benefit of, amounts to a ratification. 1 Rol 731: Co J 320 1 Brat 132.

A person contracting for a tenement void, but not actually, is only voidable. 2 Blackstone (Blackstone) said that they should ~~[illegible]~~ be considered voidable in all cases, if relinquished by a consideration than all the rights of the infant could be prejudiced. 3 Burr 1794: 1 Brod 189

If receiving a pecuniary relation a person seen keep the person he has received upon a contract after he has avoided it. Judge Hume thinks that he cannot, but then are these cases opposed to his opinion.

If England if a conveyance is made by an infant by a fine or recovery, it will be valid unless avoided during coverture. In the State of Ohio. An infant is allowed five years after his coverture to avoid it.

If an infant does an act which he could be compelled to do by a Court of Chancery, it will be valid. Co Lit 45

Money borrowed by a minor to purchase ~~[illegible]~~ Money to lay out in necessaries ~~[illegible]~~ (must be shewn) appropriated for that purpose. law ~~[illegible]~~ (when it was in fact the trade of Minority) is actually ~~[illegible]~~ ~~of such education~~. ~~[illegible]~~ 1 Salk 279: 3 Ld. 6.

~~When money is actually lent out in~~ Necessaries, he is liable in chancery.

Is to our law; we always hear notes as bonds, and so would seem not to be good. But in such cases the courts look into the consideration.

~~[illegible]~~ A Minor is not obliged for his ~~[illegible]~~ ~~[illegible]~~ on ~~[illegible]~~ promising of age, ~~[illegible]~~ ~~[illegible]~~ to pay. Str 670.

~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~ The reason that the law does not compel him to pay them without acknowledgement, is the presumption that advantage was taken of his youth; but his confessing them to be just does away this presumption and he consequently becomes liable. Str 670.

(!) If a minor ~~[illegible]~~ after he becomes of age ~~[illegible]~~ shall be liable for the contract such ~~[illegible]~~ he must be had [illegible] which would be a sufficient compensation, as [illegible] ~~[illegible]~~ it. 1 Roll Ab: 730: 1 Ventr 172.

[illegible] author [illegible] the subsequent subject, will be cited hereafter.

It is an important question whether ~~[illegible]~~ contracts ~~[illegible]~~ a minor ~~[illegible]~~ void or voidable? Judge Reeves concludes ~~[illegible]~~ void, and Mansfield ~~[illegible]~~ voidable. ~~[illegible]~~ Edwards ~~[illegible]~~ if he considers a contract void all the rights of the infant can be recovered, it should ~~[illegible]~~ be considered ~~[illegible]~~ otherwise void. 3 Mar 1794. 4 Mod 167.

If a minor a feme covert or a person under the disability of infancy or coverture or any other disability, sells property & receives the money, three contingencies spread of his minority. What may an infant do? and afterwards avoids the contract & receives his property & the money? family & solvent sense judge Reeves thinks would say he could not.

There after a contract has been rescinded & the money in the receivers hands, it is the same detention, as if it had got into his hands any other way, as by finding, & so he may sue as in those cases he could sue to get it up. There are three authorities opposed to this but they are weak.

There is remains a formal objection to the remedy in this case. The consideration stands in the bottom must be tendered. Property was got into a receivers in a manner in infancy.

Reasons for it and if detained it must be used for upon the principle of tort; and money must be used for [illegible] contract. But has the form of action is opposed yet it proceeds on principle, and a mere formal objection ought not to be suffered to defeat justice.

Whenever a person conveys real property by the ordinary mode of conveyance it is voidable, unless the minor disaffirms it & defeat him of the privileges of minorship.

So by when a conveyance is made by a person by power reserved, or by bonds, penal bond, sealed during infancy. [illegible]

Such modes of conveyance in this country the law does not now prevail.

[illegible] voluntarily which he ought to do [illegible] by a court of chancery, it will be obligatory upon him. He is not capable of rescinding that which he could be obliged to performance. Co Lit 35,

A person at seventeen years of age is capable of being made an executor; consequently he is capable of doing all the things necessary in the discharge of that office. If therefore he should

(1) If a minor makes a settlement upon his intended wife, it is good. There is a case to the contrary of this: but Judge Hale doubts the correctness of it. Stra 937.

A minor can be an executor upon his appointment, but cannot be an administrator. 9 Co 39: Hob 180: Cartth 446.

A minor at fifteen can bequeath personal property.

A contract made with a minor is binding till he avoids it. 1 Show 171: 3 Mod 260: 1 Vent 91 1 Mod 25

A purchase of land by an infant is good till he thinks proper to avoid it. 2 Vent 2035: Co Lit 3

As parents are bound to support their children, if they do not, & ~~the~~ they are provided with money: Levies by others, their parents are indemnified for them.

a debt for life. Then the amount of it

~~for a~~ discharge ~~of one hundred pounds~~ ~~expired~~,

he would be answerable to the representative, ~~to the~~

~~amount of the discharge~~, but he would still have

his remedy against the ~~defendant~~ person indebted, for it is not

necessary to the discharge of his office that he

should be ~~bound to such cases~~. precluded by such a

release. (Ex minis) can contract matrimony.

(1) ~~to make~~ ~~that~~ if he makes a settlement

upon his intended wife & children it is good,

~~for~~ as he can ~~can~~ contract marriage, he is allowed

the privilege of doing what is incident to it.

~~Ex~~ There is a case in which it was held that a

minor makes a promise of marriage,

~~judge Hence (perceives that~~ he is not bound to

prefer it. ~~to pay damages, for if he is capable~~

~~of making a promise, he ought to be liable for~~

~~the fulfilment of it: for then it was authority~~

~~opposed to the principle.~~ Sho. 97.

This he may do on his return after he is twenty years of age.

(A. minor can not be an administrator.

~~This case of this to be~~ instruction arises from the respect which is paid to

the testators will. It is said ~~as a further reason~~

that it is necessary for an administrator to have

A minor cannot be an administrator because

lands, but this is not ~~sound~~ for he might procure

landsman, ~~the~~ ~~for the benefit of the~~ ~~administration~~

~~power over the lands~~. 5 Co. 29 Hob 130. Cath. no. 6.

A minor can ~~devise~~ bequeath personal property

at ~~a between~~ fifteen ~~years of age~~ years of age. Co. Litt.

If a minor makes a contract, also it is

in his power to avoid it, yet it is binding upon

the opposite party till such time as the choose

to ~~avoid~~ void it ~~the privilege~~. 1 Show. 171: 5 Mod 250

Ward ~~v.~~: 1 Mod 26. ~~If~~

~~the infant~~ money lent & paid by the infant to pay bills

avoided by him. ~~contract~~ 2 Ven 205: 3 Lev 3.

All Persons are bound by law to maintain

their children ~~until they arrive at maturity~~ during their minority. ~~Case~~

& consequently [illegible] them with very improper, if he be not ~~compelled~~ ~~provided every thing necessary for them~~ and if a child does enter into a contract, for ~~the necessities of life~~ he is bound, yet the parent is also. The ground of this rule is the same as that where a man is compellable to execute a deed, and does not, if another does it for him, he is bound. — If a child contracts for necessaries, the ~~parent had the benefit of the~~ very rule by his father's mind, the ~~parent~~ his father is liable; for he is bound to support his family. The father is bound by ~~they~~ contracts of a child, by express or general authority from the parent, he is bound by.

Of Infants liability in Civil & Criminal Cases.

1st Civil cases. All a child is under 21 years, he is not liable for any expense he may do. Between seven & twelve ~~[illegible]~~ they have a sufficient degree of understanding ~~[illegible]~~ to be fully sensible of their misconduct. ~~[illegible] liable~~. All persons they are considered as of full age for the commission of crimes. Relation is not necessary ~~to their liability~~ to respass; ~~but for liability for~~ The liability for crimes, ~~it is~~.

Parents (contrary to the received vulgar opinion) are not ~~liable~~ liable for any ~~[illegible]~~ respasses committed by their children; but they themselves are as much liable as tho they were ~~[illegible]~~ ~~proximate for their misconduct~~ of full age.

Parents are liable only for the wrongs of children done by their order, or for the execution of their business.

All Slave infants are not liable under 17 years of age.

Minors are not considerable for their delicts under seventeen years of age.

Of the liability of Infants for Torts & Crimes.

~~A minor is not liable for any tort till he is from years of age~~

Volition is not necessary to render children ~~tort~~ liable for ~~crime~~. Infants are therefore as much liable for them as the they were of full age.

Parents are not liable for the torts of their children.

Minors are not responsible for slander till twenty years of age

(1.) of the liability of Infants in Civil & Criminal Cases.

Infants of any age are answerable for their trespasses.

They are not answerable for Slander & Seduction.

Parents are not answerable for the torts of their children.

If requiring a function wrongfully infants are liable for the frauds. Judge Story thinks that they are. Law 169; 12 Vin 203; 1 Sid 158

Infants are not answerable Criminally for any crime till seven years of age; between seven & fourteen they are prosecuted they have sufficient discretion to be answerable for their conduct; after fourteen they are as liable as adults.

If a statute imposes an act or an omission & infants a penalty for the omission, infants are bound by it, unless they were liable to be sued without it, unless they were bound to do it at Common Law. 2 Lev 33. 7 P.

If remaining a freeman infants are liable for their felonies. Judge Blackstone thinks they are & predicates his opinion upon the following cases. Law 169: 12 Vin 203: 1 Sid 158.

Married infants are liable for their debts & contracts. According to the current of authorities they are not, ~~but this judge finding a majority of authorities & predicates his opinion upon the following cases. Law 169: 12 Vin 203: 1 Sid 158.~~

~~Married infants are liable for their debts & contracts. According to the current of authorities they are not, but this judge finding a majority of authorities & predicates his opinion upon the following cases. Law 169: 12 Vin 203: 1 Sid 158.~~

(1) 2. ~~Of criminal cases.~~ Minors are liable. Minors are liable for ~~crimes~~ crimes according to their age & ~~as to the age, the same rule prevails as to wrongs.~~ discretion, as they are for ~~contracts~~, ~~torts~~ wrongs. ~~(Minors are liable to the degree principal as to wrongs.~~

If a law should order all persons to do a certain act & inflict a punishment for the omission, minors would not be ~~held~~ included. ~~(1) This principle of non-liability would in many cases in their favour.~~

And universally when ~~the common law does not give an action, if a statute says that what is not required by the common law, or inflicts a punishment it shall be done, & directs a special proceeding~~ a Statute directs what is not required by the common law, or inflicts a punishment ~~proceeding for the omission, infants are not liable.~~ included. ~~Co Lit 3. 70. of guardianship~~

~~The age for chusing guardians is 12 for females & 14 for males, age for chusing personal is fifteen. Property is by one stat, but is remains a question whether it is truly at the~~ Com. Law.

Infants may have bills filed against them to make partition of lands. But ~~the~~ courts of equity ~~perhaps decree~~ against infants without giving ~~the infant~~ them six months after they become of age to show cause against them. ~~or they it should not stand.~~

When a minor is to be sued, the proceed-

must be joined with him, and if he has no guardian, his master: for a minor is not supposed capable of depending a suit, and a judgement obtained without such union is good for nothing.

It remains a question, - What is to be done in civil cases when there is no guardian nor master? The same method would properly be pursued in this, as in criminal prosecutions: The court in such cases appoint one.

In a court of Chancery, suing without a guardian is not cause for an abatement; but it is cause why judgement should not be rendered.

~~Persons~~ A minor cannot sue without a guardian or ~~a prochein ami~~ next friend; ~~This is necessary in order~~ ~~that an infant in first liable for cost.~~ ~~to prevent some person on whom to charge the costs.~~ ~~The prochein ami or~~ next friend ~~is not~~ should not be ~~joined~~ where there is a guardian; ~~except~~ ~~in~~ but it should not be mentioned in any instance where there is a guardian, except the case ~~such cases as were a minor sues a suit against~~ the guardian. ~~then the prochein ami must be joined.~~

Parents rights over the Child. —

Parents are entitled to the services of their children until they arrive at the age of twenty one years, ~~and this as much as a master is over the servant.~~ ~~They~~ And any property acquired by their labour belongs to the parent.

~~The parent is~~ It will be for any injury done to the ~~entitled to the services~~ following rights over his child. ~~of their child to bear his right of action, alledging~~ ~~that he is entitled to recover such losses as he has sustained thereby.~~

The parent has not a right of action for any injuries done to the child further than he is affected thereby; for the other injuries, belong to the child to sue for.

As a parent is obliged to support his child he ~~may allege as another cause of~~ is entitled to a compensation for the expense consequent upon the injury done to his child ~~action, the expence which he was put to, in restoring his child to health~~.

The parent has the same action & for the same reason, for seducing his child away.

In order to ascertain when the parent has a right of action, on account of his child, you have only to determine, what his rights over the child are; for wherever there is a right, there is a remedy.

In the dest of cases however a parent is entitled to a compensation beyond what the law defined as loss of service; or by supposing the child would contribute under the injury, & yet is in case of seduction. In these cases ~~There are however, some deviations from this principle, that the parent has no right for damages for his child, further than for loss of service & expense is entering~~ exemplary damages are usually given. ~~when from the injuries he has received.~~

Where for instance a man brought an action for seducing his daughter, which he alleged greatly exceeded, the loss of service, & expense incurred thereby. 3 Wilson 18. And cases of this kind are common, both in Eng and this country. The character previous to this offence, make a great difference in the damages.

The principle of reward & compensation for the insult & injury offered to the feelings of the parent being here considered — Why have a parent sue for corrupting the morals of his child?

~~The~~ A parent has the power of correcting his child ~~moderately~~ reasonably & according to the nature of his offence. ~~but if he exceeds the bounds of moderation he is as much liable therefor as a master.~~

It is often asked what moderate chastisement is? A general answer to this may be collected from the books. The cases all go upon the ground that the parent a master, must be the judge. And so they are liable only in such cases as other juryes would be: they are liable only were they act through corrupt motives. If the punishment was not excessive, although the motive was corrupt yet they are not liable.

There is a law in the State of Con: that parents must educate their children; and teach them what offences are capital: and further that they must learn them the orthodox Catechism. But it has become obsolete.

Children & grand Children, & parents & grand parents, are mutually compellable to support each other, when they become paupers. But this relation ~~is~~ does not extend beyond them. ~~This is confined upon no other relations.~~

When there are several children of different degrees of ability to provide this support, it must be apportioned according to such ability. The mode of doing this is by application to the lower Court; but the ~~different~~ states have different modes.

Sons in law are not liable to maintain their ~~either~~ wives parents. This exception to the rule that a ~~husband~~ husband by taking a wife takes herwith her debts & duties is founded upon motives of domestic policy. Kirby's Reports.

If the parent does not chuse to bring a suit against his child for support, any stranger may ~~bring forward~~ indict a [illegible] memorial.

If a man marries a widow [illegible] he is obliged ~~to support her children~~ [illegible] general idea in [illegible] that he would [illegible] bound to support her [illegible] law is otherwise [illegible] the [illegible] because she is [illegible] liable. But if the man ~~marries a woman who~~ is [illegible] of supporting her children, the ~~[illegible] obliged to~~ [illegible] is bound to support them. ~~a woman who is [illegible] obliged [illegible] it, for in this case the man [illegible]~~ he takes her ~~with her liabilities~~ & circumstances.

If an infant suffers an attorney to confess judgment against him ~~[illegible] is to be done? The [illegible]~~ the Court will vacate ~~it~~ the judgment, & it is consequently [illegible] ~~force any such execution~~. The Courts are in the habit of vacating judgments, & they must consequently [illegible] from the beginning.

Parents & Children are ~~[illegible]~~ justify batteries in each others defence. It may be reasonably asked, how can they justify batteries, or in what cases? To this it may be generally answered; if the father was ~~father was~~ in a just cause, the son is justified, otherwise it is not. It is so with the father in defence of his child.

Of Settlements

This is a subject equally applicable to husband & wife, master & servant, & parent & child. —

The fathers settlement is the settlement of his children, until such time as they acquire

a new one by their own act. By acquiring a second settlement they lose the first, for they cannot have two at the same time.

If the father has no settlement & the mother has, the settlement of the mother is the settlement of the children.

The wife cannot be separated from the husband, ~~and~~ if she was to go to another place with him before he should die, she might return to her old settlement, not having lost it thereby.

If neither the father nor mother have a settlement, then the children are entitled to a settlement where they were born.

If a father acquires a new settlement it is new for all his children who are minors. and if the father is dead & a new settlement is acquired by the mother it is a new settlement for all the minor children. ~~who are under twenty years.~~

Of Illegitimate Children.

The Jy ~~law~~ & civil law are more alike upon this head.

All children are deemed illegitimate who are not born in wedlock, or within a competent time afterwards.

The civil law legitimates ~~makes all illegitimate children~~ all illegitimate children if their parents afterwards marry. ~~afterwards.~~

A child may be illegitimate tho' born in wedlock, as when access was impossible.

It was formerly the case in Jy that they would consider children legitimate provided the father was on the island. But it is now departed from. Lewsuits which has occasioned inability to be found for declaring children illegitimate. Where couples have been

Mensa et thoro they are presumed illegitimate presumptively till cause can be proved. ~~as has been before observed.~~ ~~Co. Lit. 244.~~ ~~they have separate~~ ~~the children~~ ~~will~~ ~~still presumed~~ in law to be legitimate. Co Lit 244: 1 Roll 357: 358: 1 Salk 122: 123: 484: 5 Mod 420: Sharp 325: 940: 1076. ~~That is the child presumed~~ ~~Co~~ ~~a pregnant~~ The pregnant woman marries the child will be presumed legitimate after ~~an~~ ~~another~~ ~~year~~ ~~when~~ marriage is ipso facto legitimate. 1 Roll 358: — ~~Illegitimate~~ 1 Dano Ab. 729

Illegitimate children cannot inherit by operation of law. ~~but they are the property of their mother~~ ~~Even~~ ~~illegitimate children are not in law to be~~ ~~filius nullius~~ ~~the children~~ ~~The person~~ ~~of whom~~ ~~the property which~~ operation of law would go to legitimate children will rather escheat than go to them.

They may ~~now~~ acquire property by purchase ~~inherit~~ by ~~any other~~ the mode: ~~than the law~~ They are required by reputation. ~~The if that father goes to the world by calling his eldest son, without further ceremony it will not go to him~~ Co Lit 123: 123: 2 Roll Ab. 729: 785. —

Illegitimate children are ~~always~~ entitled to a settlement ~~in the~~ ~~settled~~ where they were born. ~~Where a pauper woman~~ ~~pretend by some that town to be~~ ~~pretending upon the pretext~~ ~~that to place~~ ~~any a neighbouring~~ woman to remove to the purpose of concealing that she bears a woman is so away to order to avoid the liability in such cases they belong to the town to be was guilty of the fraud, or perhaps she was sent to Jail till she brings forth; or when the person is not a vagrant the proceeds in travelling. In Co mothers settlement is the same child: which inferences rep the idea that a is the child of the parents

Of Guardian & Ward.

~~There are two kinds of guardians to be treated of here. 1st Guardian in Socage, which is a guardianship by the common law, & guardian by will, which is created by a Statute.~~

I shall first proceed to treat of guardians in socage which takes place when ~~a person dies leaving a child under the age of fourteen, & whose land has descended~~ to whom lands have descended is under the age of fourteen, the person ~~has~~ becomes the guardian ~~of~~ in socage of the heirs of his to whom the estate has not descended. Co Lit 87. a. 88. b. 89. b.

~~The~~ Such a guardian has not the control ~~over the~~ of the wards personal property, though it has the power over the person. 2 Bell 20.

~~It~~ He has ~~not~~ the power of selling the wards real estate. 2 Bell 20. Co. 89. b.

It is necessary that the Court of Chancery should give bond, ~~This guardian if required must give bond, & be approved as much as any other guardian;~~

~~He is~~ He is also ~~bound to be obliged~~ bound to account as often as that Court may require, ~~& further they are liable to be then displaced if the Court of Chancery considers~~ & be displaced if the Court of Chancery considers him to be an improper person to be intrusted with the guardianship. ~~Underwood~~ 2 Mod 177: 1 P.W. 703.

~~A guardianship by will is another species which is a guardian by will~~ is created by virtue of Ch. 12, which enacts that a parent might ~~appoint~~ appoint a guardian by his ~~will~~ last will & testament. ~~Provided they dispose of his children by testament.~~

~~This is a complete guardian having~~ The control of ~~the~~ the real & personal property as well as over the person of the infant. He is guardian till twenty one; he is subject to the Court of Chancery ~~like~~ in the same manner as a guardian in socage.

~~A father is sometimes guardian; when the child becomes possessed of property. The power is lodged in Chancery with respect to him as to the others.~~

~~When~~ If the father is dead the mother ~~she~~ is entitled to the guardianship ~~is dead & the mother~~ ~~living, he or she is appointed guardian~~ of minors till they attain the age of fourteen years, ~~[illegible] they are~~ ~~that being the age of fourteen years,~~ ~~[illegible]~~ which being the age at which they can chuse their guardians. ~~(fourteen years) by the [illegible] law~~.

This guardianship extends over the real & personal estate as well as over the person.

If a Minor ~~[illegible]~~ should elect ~~a~~ for his guardian an improper person, the Court of Chancery ~~can~~ ~~control it~~ ~~[illegible]~~ can overrule his choice.

The mother is entitled to the guardianship ~~as guardian~~ of females until thirteen or election; ~~[illegible] as is there~~ & it is suspended whether that ~~it~~ is twelve or fourteen. In law the law is the same with respect to the guardianship of the mother, excepting, that she is only guardian to the females no more than males unless appointed.

~~While the parents are dead,~~ Guardians of ~~[illegible]~~ are appointed in the state of New York by the Court of Chancery & the Surrogate. ~~[illegible] appointed the guardians [illegible] subject to the same Control as guardians in socage.~~ (#)

When the guardian acts improperly the ward may bring an action against him, by his prochein Amy.

When he wants call him to account for the property, an action of account is the proper suit. — ~~The~~ guardian ~~is to pay the money~~ must pay interest. In Eng. as lawful interest is not always to be obtained ~~got~~, he must pay ~~[illegible]~~ such interest as he ~~can pay or what~~ could there be procured.

~~There are cases where~~ If the guardian has traded with ~~[illegible]~~ the wards money ~~in trade; & then~~ he must account to him for part of the profits. This is in consideration of the danger of his ~~probably upon the principle that there is danger~~ ~~of~~ failing, & of the infants losing his money. ~~[illegible]~~

If a guardian should ~~lay~~ purchase lands with the wards money ~~and he can~~ it would be optional with him ~~to be at his option~~ to take it or not when he arrives at full age ~~at pleasure~~. 1 Ves. 456.

~~As to the property at present he is like any other bailee.~~ The guardian might sell the real property, ~~but the real he can only mortgage it with~~ if ~~he thinks best~~ it may be, lease it, ~~but not sell it~~. — Wardship is guardian by law not at law. Guardians dispose of the wards property ~~before~~ for the purpose of giving him a better education than he could afford; but ~~the~~ courts of chancery will stop it. 2 Ch. 353: 3 Atk. 399.

Guardians can dispose of personal property as the have any encumbrances upon real.

When a guardian commits waste, an injunction will be issued upon ~~report~~ the suit of any person in behalf of the ~~guardian~~ ward; or upon the suit of the ~~guardian~~ ward united with his ~~Mother or any~~ next friend.

Of Master & Servant

~~There are two kinds~~ The kinds of servants are of various descriptions as servants for life, ~~servants~~ for a term of years or annual servants, & the day, or common servants. — There is also another class ~~of servants~~ who are termed servants in law, viz Attorneys, factors & bailiffs.

Of Slaves or servants for life, The Constitution, since the abolition of villainage, recognises none; ~~Seven states.~~

~~It has~~ It owes its existence ~~only~~ to practice & arbitrary power. ~~This is in the contrary.~~

Such a state is however recognised by the laws of New York. ~~They have in the state~~ ~~in consequence which slavery existed in~~ ~~(for now it is entirely abolished)~~ ~~all the privileges of servants for years: — They cant acquire property & had other privileges~~

(1) Lyon Justice said, that an apprenticeship was a personal trust between the master & servant, & determined by the death of either of them, nor did the mind & design of the parties admit it could not be obtained, & it may be the executor is of another trade. He admitted covenant would lie against an executor; but is that a sufficient inconvenience, because the executor may make his defence by pleading no assets a debt of a higher nature. 1 Salk. 65.

Holt said that the covenant for instruction failed, but that he still continues an apprentice for maintenance. The executor is liable in covenant if he does not instruct him, or find him another master. Pl Cudsipe 216. 2 Strange 1267. ~~so (1) Salk~~

~~(2) They cannot be distrained neither by but by Dod~~ ~~1 Salk 68.~~

~~The apprentice is not assignable. Pl~~

~~Whatever an apprentice gains belongs to the master the may have an action for it. Pl~~

~~(3) But~~ In another case it was determined that the Executor ought to teach the apprentice the trade if he is one of the same trade, they ought to assign him to another who is of the trade, so that ~~they~~ he may be taught according to the covenant: & Dod. Judgment for the Plaintiff. — 1 Lev 177. From the whole tenor of the authorities it seems to be established that the he is not liable for breach of covenant for not instructing a person to be instructed; but is, if he does not maintain, unless he offers to ~~instruct~~ furnish another master who will instruct.

The apprentice is at liberty to go where he pleases after the death of the Testator. The covenant is entirely at an end if he chooses it should be. 2 Strange 1267.

(2) By a Stat. of the State of N.J. he is liable to serve double the time he absents himself after he becomes of age.)

Servants for years.

A person can be bound an apprentice only by a Deed. No contract for his service, but by Deed. Deed.

(1) 1 Salk 68: 6 Mod 182: Hay 117. 1 Str 60

at Common Law

A minor is not bound by any of the covenants contained in the indenture, but the person who binds him. 1 Burr 66 (2)

The master is entitled to the apprentice's services; but he cannot assign them. 1 Salk 68: Mod 174. 2 Str 267: Mod 182

The principles of the Com Law are opposed to it, for the binding is grounded upon the confidence in the master mentioned in the indenture & on them alone. (1) ++

If an apprentice runs away all the property he has by his labour belongs to his master. 1 Salk 68.

If an apprentice leaves his master without any cause it is considered binding, they are both liable in this case. The minors are entitled to all the rights which are incident to a binding, tho' the rights of relation may be dissolved at the pleasure of either. The master cannot compel the servant; nor is this an easy death. If such an apprentice stays out no more he is entitled to all the rights of prentices. This apprentice has all the chances upon a pleasure that a London apprentice possesses during this stay with him. But this pleasure can never be long at pleasure.

There is an Act, which has been copied in many of the States, which enacts that minors who have no parents nor guardians may bind themselves out. But they are not liable in this case on covenants. They cannot enter into covenants. They are not

Prosecuting for the offence upon the indenture; are they liable? Judge.

The only effect of this is, it may serve as a bar to prevent it in the person of the master to recover him.

If he runs away he is liable to be taken up by the master.

Cas Ch: 6 J. 49: 1 Dun 40: 2 B 157 & 187.

~~2. Of their servants:~~ If they go away they cannot be compelled to return; nor has the master any right to the ~~property~~ money they may acquire during the time of their service. They may be made liable for damages arising through their misconduct & according to laws of key they may be chastised, but ~~the master extends no day between~~ ~~Flogging~~ is not practised in this country. 6 Lis 117.

In hiring ~~a servant~~ a servant without specifying the time it is always understood to be for a year. ~~Not so in Lon. 6 L.22.~~

Persons who stand in ~~loco parentis~~ ~~the place of parents~~ may bind out as minors those who have adopted them & may bind them out. ~~Persons who have stood in that relation have been held to have been provision adopted, not an ordinary assumption of that power.~~

By ~~the~~ ~~the~~ ~~overseers of the poor~~ may bind out ~~the~~ poor children who have been chargeable to the parish. Females under 18 are above ~~age~~ ~~they are~~ eighteen years of age ~~& are~~ ~~they be~~ not within the statute & this has ~~engendered~~ the idea that ~~females are~~ they are of age at eighteen. ~~the statute of 5 Eliz.~~ ~~the probable opinion~~ ~~the apprentices parents may discharge, but~~ there is no power any where ~~by~~ according to the law of discharging this relation, more than that of ~~parent~~ parent & child. But in Eng. courts under certain circumstances may discharge apprentice. When an apprentice, or servant or slave has been cruelly used, Justices have the power of taking ~~you~~ both master & servant to the next ~~county~~ Court of Quarter Sessions ~~cause~~ who, if just cause appears will discharge ~~them~~ ~~the apprentice~~.

If a master is in the habit of suffering his servant to contract for him, he is liable for his ~~the~~ contracts ~~of that sort~~ to the same extent ~~where~~ when he does so without his permission. ~~the circumstances extent.~~ 2 Ld Ray: 1 Mod 235. (1)

(1) A master is liable for the trespasses of his servants when the consideration comes to his use. (1 D Hay 224.)

(1) There can be no doubt but that he is. A man is unquestionably justifiable in ~~defen~~ committing an assault & battery in defence of his property. If a man was makes an assault upon an house the owner can thereby justify ~~an~~ a battery. Much more in defence of a man, in whom he has a property equally absolute & certain with. — 2 Lord 1480)

(2) When the King sold some property & appointed the Chancellor of the Court of Augmentation to take the bond; & he delivered it to his servant to be cancelled it; the Chancellor by the opinion of all the Judges of England was not liable. For the possession of the servant was his possession. 3 Mod 323.

So when ~~the~~ an officer of the Customs made a deputy who concealed the duties, & the master being ignorant of the concealment, certified the customs of that part of the revenue into the Exchequer upon Oath, he was adjudged answerable for this concealment of his servant. 1 Mod 219. 1 Rolle 95. Pop 143. Cro J 469. 3 Mod 323. 2 Roll Ab ~~Ca~~)

This liability continues in some cases, even after the relation is dissolved; as when for instance the party with whom the servant has been in the habit of contracting with the master is not aware, nor has had time to be supposed of the dissolution of the connection.

The master is liable for the injuries committed by his servants in the prosecution of his business. ~~The act done by his servant is considered as if done by himself.~~ ~~But proper care should be taken to be sure.~~

~~If the servant has made the master liable by his tort, he is also liable to the master, to the extent that the master has.~~ The master is liable in cases where the servant ~~suffers for want of property.~~ ~~the servant~~ Persons ~~citizens~~ are not prevented from suing; ~~in fact, a person~~ ~~persons~~ are liable to the master employing them knowing of such disqualification. 1 Salk 380: 2 Ray 1116.

The master ~~as before observed~~ is entitled to an action for beating his servant. The foundation of it is the loss of the service ~~of the servant~~. 9 Co. 113: 10 D: 131.

A servant is justifiable for ~~justified in~~ a battery in defence of his master; & it is also said that a master is justifiable for ~~in justifying~~ a battery in defence of his servant. 2 Roll 546. (1)

When a master would avail himself of his servants contracts, he must declare ~~in the declaration~~ as this it was made to himself: for in law, what ~~a man does by another, he is considered as doing himself~~ & we by an what is done by the principal.

2) ~~As to the powers of the servant &c. 1 Mod 20 C: 1 Roll 95: Pop 143: Cro J. 466: 3 Mod 325: 2 Ld Ray 146.~~

When a servant or other person, comes into the possession of property legally, and disposes of it, contrary to the implied or express condition of the

owner; it is as a general rule only deemed a breach of trust & not theft. But when a man procures property with the intention at the time, of defrauding the owner of it, then it is deemed theft. So a subsequent intent makes only a breach of trust, and a previous intent makes theft. Let R. read this read

As to an apprentice claiming upon his master's executor or administrator, there is no determinate rule. ~~Cro. Car. 216: 1 Leg. 177: See 1 Ld. Raym. 216~~ See ante 208

Of Sheriffs

A Sheriff is the great conservator of the peace and a man of much authority. — ~~The rules of his duties will properly be considered this lecture as under one~~

1st It is the duty of the Sheriff among other things, ~~to execute all writs~~ to execute all processes, to keep the peace. ~~execute any process it should be remembered that he executes it legally, with exceptions then~~

2d The Sheriff is ~~liable upon bonds of the peace~~ liable in all cases for escapes from gaol ~~except in the cases mentioned~~ unless caused by the act of God, or by the open enemies of the land.

But if the escape was ~~occasioned by negligence~~ for a negligent escape & the prisoner is retaken before ~~the sheriff is not liable~~ it ~~If the escape was~~ as a voluntary escape in the first place ~~the sheriff~~ he is liable at all events, ~~the voluntary escape~~ for the Sheriff ~~may~~ to take the prisoner.

3d If the Sheriff bends the rail, he is not to do so, for they are built by the county and for this reason Sheriffs are not here liable for escapes thro' the insufficiency of the rail.

Of Liens upon the Jail & Officers.

The Sheriff or general keeper of the Jail. For [illegible] there are some exceptions, as [illegible] the right [illegible] a lien on [illegible]. Imprisonment at Common Law grounded upon the principle of lien, & was original the duty of the jailer to keep the prisoner for the creditor due a debt. [illegible] provide for these ideas are [illegible] in [illegible]. [illegible] expense incurred upon [illegible] of making satisfaction, [illegible] be so held [illegible]. The creditor is neither [illegible] by giving the time the [illegible] by other ways [illegible] the creditor [illegible] the [illegible] of [illegible] the creditor [illegible] day. If at first time [illegible] suffered the prisoner to escape, [illegible] he was responsable; if negligently, [illegible] for [illegible]. Thus was there [illegible] only to pledge [illegible] way without his remedy! [illegible] the [illegible] of the jailer.

The escape of the Jailer was [illegible] which flew as an action against the Sheriff when the prisoner was confined upon an action or execution for his [illegible]. This was made [illegible] to enable the Sheriff to obtain writs from their stewards. In the reign of Richard 2d there was another Stat was enacted, which gave the same remedy against the Warden of the Flet, & the prisoners confinement was for debt. And from these Stats originated all the law upon this subject. For there is no other Stat in any Common Law states regulating it, but it is entirely upon the Courts extending the equity of the Stat to all jails & all debts. Thus the [illegible] of extending the equity of the Stat has enlarged [illegible] Law, being partially remediable.

The Court then concluded that if it was reasonable for an action to lay against the sheriff for the escape of the prisoner there was the same reason that it should be maintained against all other jailors. It was then an inference from this, on every thing adopted the Law constructive.

An action against the Sheriff for an escape lies as well for an escape upon a mesne process as upon a final process.

The action of Debt for an escape upon mesne process will not lie for an escape upon the Sheriff upon mesne process, for there is no definite sum due till after judgment. The proper action in the case, and is left to the Jury by circumstances. The action for an escape upon the Writ of Ca. Sa. was the action was for damages. The Jury were, however, [illegible]

Plow. 37 b. Lev. 154. Cro. El. 754. 2 Ro. 29: Sho. 90.

There are two kinds of escapes, voluntary, & negligent.

Voluntary escapes are with the consent or connivance of the Sheriff or Jailor. Voluntary escapes are treated Negligent escapes, are such as are not voluntary.

If an escape or the latter description the Sheriff takes a prisoner upon action brought, he is not liable, but if the escape was voluntary, he is liable at all events.

The Sheriff is said not to be liable if he takes a prisoner upon action for escape, because the creditor is as well off as before the Debtor escaped. It may here with propriety be asked why is he liable even after action is brought if he retakes the prisoner? There appears to be no solid reason, but there is a maxim in law that when a right of action has attached to a person, the law will not interfere.

That the Sheriff has been rendered liable for negligent escapes does not deprive him of the right of taking the Debtor, but he may do so for his own security. 1 Show. 273.

It is ~~said in law~~ usually laid down that if a Sheriff retake upon fresh pursuit he is not liable. This however, ~~must~~ is understood to mean that if he retakes & returns the prisoner before action is brought.

If he does not choose to retake the prisoner he may ~~either~~ bring an action against ~~him or against~~ the escapee & their abettors. [illegible] 53 [illegible] 597 [illegible]

If the creditor chooses he may retake the prisoner ~~a~~ as well after a voluntary as ~~after~~ a negligent escape. For the sheriff ~~against a~~ ~~[illegible]~~ ~~which~~ which is against an express rule of law [illegible] charge the Sheriff. 3 Co 52.

And a creditor after accepting the prisoner cannot ~~after~~ bring an action against the Sheriff. 1 Saund 269. 1 Sid 330.

~~So~~ The Creditor may bring another action against the prisoner of Debt. ~~[illegible]~~ 2 Show [illegible]

~~The~~ In negligent escapes the Sheriff ~~the Sheriff is at all times liable~~ ~~[illegible]~~ has not the right of [illegible] ~~This~~ is for the [illegible] of ~~[illegible] on account of any question~~ ~~[illegible]~~ ~~possession of~~ in ~~[illegible]~~ the Sheriff ~~[illegible] an illegal act~~ is ~~being so [illegible]~~ ~~law~~. ~~And~~ And if the prisoner should ~~[illegible]~~ give bonds to the Sheriff for his escaping ~~[illegible]~~, the bonds would be void. These bonds, ~~[illegible]~~ are founded ~~in [illegible]~~ in policy ~~of the law~~. Plow 60. 1 Lev 32. 1 Sid 330. Bac [illegible] 313.

~~It is said that there is one case where the Creditor cannot retake [illegible] [illegible] [illegible]~~

If the creditor suffers ~~the~~ his debtor to escape he cannot retake him, for the law in this case presumes that the debt is satisfied. Show 174

~~[illegible] for the Sheriff to let a prisoner go, yet it is [illegible] there is [illegible] policy in it. [illegible] the policy is the other way, for such a rule tends to alleviate the misery [illegible] in consequence of imprisonment. The Judge thereby [illegible] the principle on which the courts have proceeded was that it was to [illegible] that the debt was paid. [illegible]~~

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By the common law;

~~At Common law~~ If there are two joint debtors, & one of them has been imprisoned & ~~let go~~, released, the other cannot be taken ~~you cannot take the other~~. It is said, that the reason is, the remainder would be liable for the whole, which would be unjust. But we can't see how it can be more, that one should receive the whole and of him: so the other would be as well off after the discharge of the first as before.

~~But by the mercantile law~~ [illegible] ~~[illegible] the [illegible] joint debtors. [illegible]~~ ~~[illegible] those who [illegible]~~

But by the mercantile law a creditor may take those debtors who remain after having released others ~~or debtors~~ from imprisonment. ~~[illegible] law~~. 2 ~~Ld~~ Wl. B. 1235.

The Sheriff is as much liable for an escape ~~in~~ when the commitment was on ~~a~~ mesne process as when it was on final process. ~~as on execution~~ 2 Wils 294.

In a commitment on mesne process the body is held as a satisfaction of the judgment, not of the debt; the judgment therefore for an escape after such a commitment will be ~~held~~ for ~~will~~ what the jury think proper to assess. ~~taking into consideration the expenses of the suit~~. The property of the prisoner in such cases is not ~~will make no difference~~. a subject of consideration.

If a prisoner ~~man~~ is rescued when going to gaol upon mesne process, it is an excuse for the Shff, ~~then not~~ but ~~not~~ it is otherwise when a rescue is on final process ~~when taken going on execution~~ 2 Roll 807: 3 Lev 46.

If a man is in gaol upon a mesne process, the Cred. may, by the Connecticut law, take possession of him within four days after the judgment, if he is not taken by the creditor at that time the jailer may let him go, for he was only bound to keep him to wait judgment, indeed the jailer cannot keep him longer than that time.

So when an officer of the Shff lets a man go upon an Execution, or when he is rescued, he is liable. The difference between our law & the Eng with regard to Executions is, that here the officer has to seize & take the prisoner in: if he should after once having him let him go, he would according to the

[illegible]

[illegible]

[illegible]

If a prisoner escapes from the custody of a sworn officer without complaint or a prosecution, whether it is a voluntary or involuntary escape, upon these grounds, that by the first escape it becomes a voluntary escape, and the prisoner is considered as a voluntary escape from the custody of the sheriff, as it was at the time the prisoner had once escaped, it is thus accounted, to put him in close confinement. But if it is the first time only, a negligence or escape is evident from this, that if the prisoner has not where before action brought the sheriff can have his remedy upon the bond, which he could not in a voluntary escape. Quare.

If the prisoner escapes on death or mesne process that the creditor can have no remedy, as the sheriff comes upon the bond? or when a sheriff or his deputy [illegible] the death of the [illegible] by [illegible] or when the debtor procures the escape of the prisoner by collusion: in which case the creditor could not recover of the sheriff. ~~[illegible]~~

Quere Where is no difference between civil & criminal an action of Debt is the proper for an escape, in which case you cannot recover less than the whole damages; yet in an action upon the case there may be.

~~Where an action upon the case is for a civil and criminal you cannot recover less than you could upon an action of Debt.~~

~~Of the Office of Sheriff in Connecticut Law.~~

In Connecticut, Sheriffs are excused when the prisoner escapes through the insufficiency of the Gaol, in such cases the County is liable.

~~In all cases where the County is liable the County is exempt by escapes arising by the insufficiency of the Gaol or Prison by the open fire, the law.~~

~~If any person who is in prison in one hundred of the County, escapes out of the custody of the County, the County is still liable of the prisoner.~~

If in Connecticut the duty of the Sheriff is certain, if the County is liable to have for them; & if a person escapes in the Gaol of any Prison the Sheriff burnt by the Indians, the County. But this duty is represented through the Sheriff, not to extend to the general use of the Gaol, & escapes through such accidents makes the County liable.

There has not been established a fixed Manner of the Sheriff to hear from the Sheriff is liable. The method of recovering satisfaction from the County is by petition praying the County Court to direct the Treasurer to pay the damages. And it has been decided (very unanimously) that when the prisoner was worth but little or nothing at all, that little more than common damages shall be allowed.

If an officer does not take the person against whom the execution was issued, or make a return within 60 days that he is not to be found, he will be liable for the whole debt.

~~If a person for the Debtor's time.~~

If the Sheriff escapes having thus rendered himself liable from escape the money cannot be recovered out of his Executors. ~~For it is a maxim of law that the law does not protect a man receives no benefit, however injurious they may be to others, nor to recover back upon his death.~~

~~This law is laid down generally, but Judge Iredell thinks it is not good to that extent.~~

~~It is to be considered under our complete control; as when a Debtor spends [illegible] he becomes the law's debtor.~~

~~It is doubtful~~ doubtful whether a Sheriff can detain a prisoner upon a voluntary return after a voluntary escape.

~~This has a stipulatory power not given can suspend escape where the country is broken; [illegible] the same difficulty exists the reverse of the State. — There is one case in the courts carry the laws into execution. The laws~~

~~It is~~ does not allow members of the same State to sue before the Federal Court & it appears that [illegible] citizens of different States should [illegible] them, in the State where the Dft lives. And this court must regulate itself by the laws of the State in which it sits.

Now the Corporation cannot be sued before the federal Court not being a corporation; you to be sure may bring a petition against them but they would not be liable. But this would [illegible] unpleasantly upon [illegible] at regulation, that Debtors living in a different State from Dft, may be sued before the federal court.

The Sheriff has always a right to detain the prisoner for ~~fees, & [illegible] & [illegible] have a right to detain any other pledge. [illegible] that it will not release him from these demands.~~ Witnesses in all cases in which ~~[illegible]~~ are required by law ~~[illegible]~~ to be detained ~~[illegible]~~ are not obliged to attend unless ~~[illegible]~~ minister ~~[illegible]~~ bill they are paid their fees. And for this reason witnesses & Jurors keepers may detain ~~detain~~ return bill they are paid. Judge Iredell thinks that if ~~[illegible]~~ Jurors keepers ~~[illegible]~~ a notification that he will be answerable for damages, it will not excuse him. ~~[illegible]~~

It is a common law principle, that Justices are obliged to support ~~[illegible]~~ with well [illegible].

(1) It remains a question whether an assent is void when a man has been illegally bribed ~~whether the offer~~ Judge Shaw finds that it is, because no right can accrue in consequence of a breach of law.

A voluntary escape is considered as a very high offence & the keeper is liable for the crime for which the prisoner was held: & the same penalty, if guilty, is also inflicted upon the abettors. And further is always inserts a profitable office. In negligent escapes the Sheriff is always subject to a fine according the nature of the case.

Of an Officers power to break Doors.

Where a Sheriff is permitted by law to break doors, he must.

In civil prosecution the Sheff cannot break the outward door, but after one entering he may break any of the inner ones.

In criminal prosecutions the Sheff must break the door, if necessary, with force, unless there is imminent danger of an escape. Cowp. 50 ff.

If a man has been once taken & escapes before civil process, the Sheriff may break doors to attach him. And if he has been taken by a prisoner, & escaped, he may break doors to retake them.

A House is no protection to any person but the owner.

~~Altho' a Sheriff cannot generally speaking, break outward doors, yet after one entering, he may break any inward ones. The reason of this is, that according to the custom of London it is forbidden for fear that robbers might take money of it. But this cannot prevail in the country. The reason there is probably to prevent robbers & thieves being alarmed.~~

(1). A remarkable question whether the Defendant ~~what would be the consequence of breaking doors~~ ~~By some or either of the parties~~ ~~whether~~ the corporation is liable for the damages, ~~there~~ ~~it is needless to say~~ ~~for~~ Judge Prime thinks it for no advantage ought to be permitted to accrue from a violation of law. ~~All the principles that we have any thing to~~ ~~period, a man expects no advantage from violation of~~

There is some difficulty in determining what is to be ~~It [illegible] often a question, what is held to be an outward door.~~ considered an outward door.

~~Where~~ If two persons live in the same house, & each have different outward doors, an entrance into the outward door of one with his consent, is an illegal entry with regard to the other.

~~There are some exceptions to the rule that an officer may break outward doors.~~ The inner door of a private house & lodger ~~is an outward door~~ is ~~or as~~ outward door of the lodger, ~~as [illegible]~~ ~~[illegible]~~ & it is ~~as~~ consequently illegal to break it.

It remains a question ~~whether~~ it is illegal to break into a Stranger's [illegible] ~~[illegible]~~ conveys himself into it ~~to his store~~ ~~you can~~ break ~~that?~~ In a case in Brookes Cases ~~[illegible]~~ it is said that you may [illegible] as that the [illegible] not [illegible]. ~~[illegible]~~ in a case in Connecticut ~~[illegible]~~ [illegible] hospitable Doctor Johnson & ~~[illegible]~~ ~~Advocates~~ gave it as their opinion that it could be done. But there is no decisive case upon the point.

If it is true that you cannot break a house because it is an asylum to the wife & children, it is certain that you may break the Store, this reason not there existing.

~~It has always been held to be a Common law principle that~~ At Com. Law Shff may ~~make deputies~~ appoint as many deputies as he pleases & he ~~may~~ ~~Yet~~ yet he ~~may~~ can not restrain them in the exercise of their authority. Hob 13.

In this State the number of Deputies allowed them are limited; & he cannot here make them without the approbation of the County Court.

The man who becomes bail to the prisoner becomes at the same time keeper of him if he chuses to exercise that power & he may confine him when he chuses.

This in Con. the ~~[illegible]~~ of the bail ~~is~~ is that he appear in Court when called, yet if he appear & surrender himself up within 60 Days after, it will ~~[illegible]~~ save the bail.

~~When~~ If the Shff refuses to take bail upon ~~[illegible] an action [illegible]~~ ~~trespass or in Assise~~ or action on the case for neglect ~~of duty.~~ ~~Judge Reeve thinks either may~~ Judge Reeve thinks that either trespass vi et armis or trespass on the case will lie against him.

~~Mr Kaplan. They have~~ It is settled ~~to be by that~~ trespass ~~decision~~ on the case would lie ~~is proper one.~~
Cr Ch 196. 2 Roll 551.

Innkeepers

~~The Innkeepers are entirely~~ exempted from their general liability ~~except only for the consequences of their own acts~~ of God or the King's enemies or the act of the guest ~~or that he not obliged to receive and keep all persons that come to his house~~ They are not obliged to receive and keep all persons that offer themselves with the dog or property of their friends.

~~Nothing in this is to be taken from the principle upon which the liability of innkeepers is based. The principle upon which innkeepers are liable & those carriers, is probably from the principle of preventing cheating & robbery.~~

It is the duty of an Inn-keeper to entertain his guests with cheerfulness & civility.

Innkeepers & other House keepers are under no obligation to keep a public house.
Palm. 574.

At Com Law there is no capacity of procuring a license to keep a public house. ~~but~~ They are by prescription, the law leaves it to be indicted as a public nuisance. ~~so innkeepers may keep their business by civil suit or action. So this not for civil injury alone, but for a criminal to punish offence.~~ 6 Ch 549.

~~We have a stat in Eng upon this business, which gives innkeepers to procure licenses. They are recognized as a necessary of the grand jury men & justices of the peace Courts, who issue the licenses; it is recorded that they pay a small fee for these licenses.~~

~~Has the duty of Inn-keepers to entertain all travellers. They have not the power to say that they will entertain certain persons, & refuse~~

others, unless their rooms are ~~[illegible]~~ ~~[illegible]~~ kept separately for persons of a ~~different~~ certain description. If ~~they~~ he is refused a seat out any unoccupied the [illegible] of the [illegible] the [illegible] should be furnished him & if he still [illegible], &c ~~[illegible] different causes yet if the traveller [illegible] then the piece of an inn [illegible] lodging & [illegible]~~ he [illegible], & he refuses, he is liable to an action. ~~[illegible] be [illegible] that the tavern~~ keeper he may refuse when he has a reasonable excuse. 1 Bl. 87. Cowper 180. For unreasonably refusing to receive guests they are not only liable to a civil action but also ~~will [illegible]~~ they ~~[illegible]~~ to entertain ~~[illegible] suppose [illegible]~~

~~They ought~~ It is their duty to have at least one bed in a room, to receive as many guests as one for every bed, ~~[illegible]~~.

~~A man requests~~ The tavern keeper ~~[illegible]~~ ~~[illegible]~~ is obliged to receive the ~~horse of~~ traveller although ~~[illegible]~~ the traveller [illegible] not stay with the tavern keeper himself.

~~But then~~ The tavern keeper however is not obliged to ~~keep~~ receive any thing that does not yield profit; as trunks, goods &c unless the owner accompanies them. ~~[illegible]~~ If he does, ~~they~~ is the tavern keeper obliged to keep them over such as is necessary for travelling ~~[illegible]~~ to carry with them. ~~in travelling~~. 1 Show. 268. Moor 867. 1 Salk. 388.

If a horse is put to pasture by direction of the traveller, the tavern keeper is not liable unless he has ~~been~~ guilty of ~~[illegible]~~ gross neglect, ~~[illegible] would [illegible] liable, [illegible] being [illegible] capacity~~ as leaving the bars down, or putting him into a lot where the fence was broken, &c. 1 Salk. 18: 8 Co. 32. 2 Brownlow 255.

They have a practice in Eng of compelling an inn keeper ~~[illegible]~~ to entertain; for this purpose a justice of the peace is authorised & also the constable to [illegible] the inn keeper ~~[illegible] for not entertaining, but may~~ also to compel him to entertain ~~[illegible] by the constable to entertain~~. [illegible] 170: Latch 177: Noy 9.

When a tavern keeper is sick, & he recovers a remarkable report ~~[illegible]~~ in other ways that he will be convinced, lie upon the floor. He is not in this case liable for his property, he not being considered a guest.

If the tavern keeper requests the property which is refused, he is strictly not liable for the property. Mon 178.

He is likewise liable if the trunks, contrary to his express, was not left the room of the guest.

If the guest is robbed by his own servants; the tavern keeper is liable. If the same occurs ~~[illegible]~~ by a man who came with them. 8 Co 33. Co 31 185.

If the tavern keeper requests to know what property the guest has, & he tells them wrong, the tavern keeper is not liable for more than he told him he had. Mon 158.

No other person than a guest can hold the tavern keeper.

It will then naturally be asked how can the guest prove what property the guest had? This is very difficult without departing from common law principles. Perhaps a man may be permitted to swear to the amount of property he had, as in cases where he has been robbed & wishes to charge the County. But there can no deceit arise upon this subject.

As the person for whose goods the tavern keeper is liable must be a guest, it becomes important to determine who a guest is. He is not a person who comes only for the purpose of drinking, nor a man who stays at a tavern & eat tavern meals, or a man who goes to an inn boarder for a month. But a person who comes only as a boarder & pay their price of board is more liable than other persons who are boarders. (Bell v. Ch. 72) & Mon 170.

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~~any~~ person, even a thief,
If ~~a thief~~ leaves a horse with a livery keeper ~~& goes away~~, the owner cannot claim ~~take~~ him without paying ~~the livery keeper~~ for his keeping. ~~Tho' if the horse had been left with a servant, he is under the same obligation~~. Yelv 67: Cro p 128. 1 Roll 3.

In private cases the liability depends upon a contract ~~between the owner & the keeper~~, but it is when a tavern keeper keeps it. 1 Roll 3.

Common Carriers are as much bound as tavern keepers; they are entitled to recover from the tavern keeper for any goods stolen from ~~which~~ them.

~~If the keeper keeps it beyond agreement~~ [illegible]
Inn keepers may either sell ~~him~~ Inn keeper or retain ~~him~~ [illegible] ~~if~~ first [illegible] until the expense for detaining [illegible] ~~the same for that horse~~. Roll 85. Cro J. 271. & for other cases before cited 1 Show 269.

But if he once relinquishes his lien, he has afterwards ~~after letting it go [illegible] property, [illegible]~~ ~~[illegible]~~ no other remedy than a suit. Sho 356.

If a horse left with an Inn keeper eats off his head ~~[illegible]~~ he may, according to a custom in London ~~[illegible]~~ ~~what is to be done? He cannot [illegible] any thing more with her [illegible] property [illegible]. There is a custom in London [illegible]~~ ~~[illegible] to these cases~~ ~~[illegible]~~ have been appraised by some judicious men & sold; but this is not a principle of the Common Law. — 8 Co 33.

Moor 876. 877. — Cro p 127.

It was held clearly by the Court, that administration of things in Ireland by the Bishop of Lond. in England was good; because it was an authority, power, or matter that follows his person wherever his person is, then is his authority. As the Bishop of London may commit administration being in Lond, but ought always to be of things in his Diocese. Godbolt 33. Carter vs Coots

And it was further holden that an administration made by the Bishop in Ireland could not bring an action as administrator in England, but was holden that he could not, because by letters of administration granted in Ireland there could be no trial here in England. Carter vs Coots. Godbolt 33.

Of Executors & Administrators

The following ~~things~~ principles will be of much assistance in understanding this subject. These principles are recognised in most courts.

The difference between Executors & Administrators is very trifling.

An Executor is appointed by the testator, & is entitled also to be appointed by the will; — he is appointed Judicially.

The principal duties of the Executor are first to pay the Debts, & then the legacies.

It is a rule of the Common Law that the Dead shall have nothing to do with the real property.

The real property goes regularly since the heads of the heir at law, or to the Devisee.

The title which these persons have to the dead estate is only by force of the words in law, and is absolutely theirs.

When there is a legacy, the legatee does not come immediately to the legacy as receiving the legal title, but it goes to the Executor, and is then not become the legatee; unless there is sufficient personal property wherewith to pay the Debts. If so, can they allow no more, but reasonable call he is just.

If he has given a gratuitous bond, intending it as a device, altho' there is a Debt, yet the same has no claim till all the other Debts are paid. Thus this voluntary Debtor is prefered to legatees.

When there is no need of any legacy, & there is property left; how must it go? Upon this question the modern ideas are different from the ancients. It was anciently held, that he was entitled to it, having the legal title & no other person having any. Thus some encroachments have been made upon this principle & we shall now consider the reasons it had.

If we now note that if there is a legacy given to the Ex. sufficiently large to raise a presumption that it was not the intent of the Testator that he should have the residue, it is not entitled to it, but it goes to the next of kin. For as there is no legacy given to him, he has of course no assistance of the presumption that it was the intention of the Testator, so in the other instance it does not go to them, that presumption being rebutted.

And in all cases the distribution of property must be according to the intention of the Testator. This is always the point stated in these distributions.

If the Ex. refuses to deliver the legacies to the legatees ~~&c~~ after all the debts are paid, the legatee has no right without his consent to take it, but he must prosecute by an action.

In this ~~&c~~ perhaps in all the States, laws in some way or another are made liable for the debts of the Deceased. But then the Ex. has not any right to take this property into his possession, but he must return to the regular course of inspection statutes.

In Ca. v. ~~&c~~ it is given the ~~&c~~ Surrogate to ~~&c~~ power to ~~&c~~ to sell in course of the law so as enough for the discharge of debts.

In his the heir is not compellable to pay simple contract debts, unless the devise is so provided in his will, but for specialty debts as bonds &c they are liable to the extent of the real property received.

~~&c~~

The specialty creditors may sue either the heir or the executor. ~~&c~~ This stands the common law.

Most of the States under the head of Unclaimed Effects, have assumed the power ~~&c~~. If the specialty creditor proceeds from the Ex. ~~&c~~ will allow the simple contract debtors to sue the heir to the values that the specialty creditor gets &c.

and if there is enough personal property to pay all the creditors, if the specialty creditors have recourse upon the heir, he may call upon the Ex to the extent of the specialty debts he has paid.

The Com Law does not as in Eq. arrange debts, but ~~they pay them~~ they are paid according to their rank.

Where courts of Chancery permitted executors for the payment of debts they allow of no preference as to rank, it is when they order an Equity of Redemption to be sold, ~~&c~~ or when the testator has ordered property to be sold for the payment of debts, & it is necessary to resort to Chancery for the fulfilment.

Duties of the Executor, & of Legatees.

When the estate is completely solvent. — Under this head will be included the law upon legacies.

Here the Ex has paid all the debts & is then his duty to pay the legacies: the residue of the property goes as before observed.

A legacy is strictly & technically when a term personal property is given: & because as he to whom real property is given.

If the legacy does not say generally so much money, but some particular money, as that contained in a purse by a direct, or if the legacy is some particular article of personal property, then it is the duty of the Ex to deliver that after he has paid the debts. Nor has the legatee any right to go & take this specific property, but must if the Ex refuses to deliver it, have recourse to an action. Trover is the proper action in this case.
Plow 55. & 25. 5 Co 29. 4 Co 18.

There is a division of legacies into pecuniary & specific. The law upon these two heads is somewhat different.

Specific legacies are when some specific identical property is given; pecuniary legacies are when some sum of money is given but not

fide

If after all the debts are paid [illegible] is not enough to pay all the legacies, the law is that specific legacies should be paid first, & then the pecuniary legacies must abate.

If there is not property enough even to pay of specific legacies, yet becomes necessary to sell some of them ~~[illegible]~~ Opinion that.
The rule in this case — that the specific legacies do not abate; but if the to sell the property designed for any legate, that legatee loses it entirely. There is one case which says that the Court of Chancery will make them abate. ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~

There are cases however, where the pecuniary legacies should be paid first, viz. where it was the intention of the testator that it should be. 1 Ves Jr. 1 Ath 416: 1 Ves 600. 6 Ch Ca 92. 2 Ch 457. Mos 412: 9 P W 422: 6 Mk 46. 1 Ath 416.

It was anciently held, & by some it is said to be so now, that if a man owes a debt, & gives exactly as he owes them, then it was — no more less a satisfaction of the debt. ~~[illegible]~~ ~~[illegible]~~

The bare circumstance of his giving the same sum, is not sufficient however to raise the presumption that it was a satisfaction for if such was his intention, he may easily have done so by his to have expressed it. ~~[illegible]~~ The last decision upon this point ~~[illegible]~~ seems to be that a compensation, unless so expressed.

When there ~~[illegible]~~ ~~[illegible]~~ to the same amount due different legacies each of the same description, without any reference to the preceding, we often find a man in one part of

If there are in the same will two legacies ~~to the~~ of the same amount to the same person, the last of which denotes the number of the first, it will be held to

be a single legacy. Note Text continued Title

he will gives to his son John 100 £ & afterwards says "I give to my son John 100 £" it was held to be a double legacy. But if the legacies were in different instruments, they would be held to be intended to be double. ~~So if it appears from the codicils it would then be a point that it was intended to be a double legacy.~~

When a man is bound by a covenant or otherwise to make a provision for a person, & leaves to his wife the allowance of what he was bound to pay, it is then held to be a satisfaction.

Pl Ch 130. 1 Pl 141. 2 Do 61. 1 Vern 520. 2 Do 319. 1 Ch Ca 236. 3 Pl 297. 2 Atk 300. 2 Atk 95. 1 Pl 100. 1 Ver 300. Ch 174. 1 Atk 245. 2 Pl 245. 1 Ver 82. 135. 1 Atk 309.

If there is not property enough to pay all the legacies, & the executor pays some of them & does not pay the others, is he liable to be sued?

The rule here is that the executor cannot compel the legatees to refund. But this is unreasonable, & perhaps he is considered as so much money had received. He can only obtain with regard to creditors. If he is most prudent in these cases to take a bond from the legatees, conditioned that they would refund to him if required.

If the executor did not know of other debts, & they had recovered since, he pays by order of the court of Chancery. The person in these instances is compelled to refund, & perhaps must, if he knew of other debts, for then he would be considered as guilty fraudulently by being made bankrupt. This last principle of equity is not known in Chancery. Case 1 Ch 135.

Whether true or not, there is a [illegible] between the legatee's creditors & the legatees upon the ~~death~~ legatee's insolvent estate ~~[illegible]~~ these facts. ~~[illegible]~~

Hill quist 2 Atk 251 Co 202.

By a Statute of this State the heir may be ~~Notwithstanding the rule that the~~ sued by Specialty Creditors in proportion to the extent ~~heir cannot be sued; yet he is liable to this creditor~~ of the Property descended ~~for the debts to the amount of the~~ property he has, so far as to be sufficient to discharge the debt. To such the Statute there are some cases in which the heir may be sued viz. when the land descends [illegible] taken away.

There is another division of legacies. viz Lapsed, & Vested.

A legacy is ~~sometimes~~ said to be ~~a~~ lapsed ~~legacy~~ when it ~~[illegible]~~ reverts to the estate ~~[illegible]~~ there being no person [illegible] entitled to it. As when the legatee dies before the testator.

A Vested legacy, is when a legacy has vested or has come into the legatee's possession.

~~It is sometimes a question what becomes of~~ ~~the estate~~ A lapsed legacy is disposed of in the same manner as the residue of the estate. ~~the same manner as the property that [illegible] has not [illegible] by [illegible]~~. 2 Vern. 1 [illegible] 2 P Wms 200.

When at the residue, or those same legacies are given [illegible], provided they do not vest, then they go according to the testators intention 2 P Wms 470. 1 Vern 259; 278. (1)

Legacies are sometimes lapsed when they are to be enjoyed at a future time & the legatee dies in the interim; as when they are given to children when they arrive at twenty one. — ~~[illegible]~~ In these cases they are sometimes lapsed & sometimes vested. To know when this distinction takes place it is necessary to attend to the following distinction. When legacies are given to be paid at any specified time then they vest, as to be paid to A.B. when twenty one. But if the word paid is omitted & the words are to be given to A.B. when twenty one, it is then a lapsed legacy. or that it is generally lapsed ~~when~~ in all cases when the word "paid" is omitted. For this distinction has been wholly adopted

(1) Legacies sometimes become lapsed in consequence of the Legatee dying prior to the time limited for his enjoying it. e.g. A legacy is left to AB. when ~~21 years~~ of age. Now if AB dies before he is of age, it does not become lapsed

~~in Chancery~~. 2 Atk 342. 1 Atk 515: Vesey 52.
2 Vern 178: P W 21: 1 Bro 297.

However to both branches of this rule there are exceptions. If for example it is ordered to be put out at interest till the legatee is of age yet it is vested; & also if it is order to be paid out of a fund wh. yields interest. ~~[illegible] a legacy [illegible] paid out as interest or to accrue~~. 2 Vern 673.

& if a legacy is paid according to the words is lapsed, will be considered as a vested when ~~[illegible]~~ ordered to be paid out of a fund which yields an annual increase. ~~[illegible]~~

~~There is also one case where a legacy [illegible] according to the [illegible] is vested, may be [illegible]~~. If a legacy is charged upon land it is sometimes lapsed when it wd. otherwise be vested. This is founded upon the policy of the law to favour heirs. ~~[illegible] in [illegible] of favouring heirs~~.

It is a question, may an Ex pay a legacy when given to an heir? He cannot safely pay it to the parent or guardian, because, if it should so happen that they should deceive the heir of it, he would be liable. But if he procures a decree from a court of Chancery to pay it to any person, he is safe in so doing. This rule of making the Ex liable where he does not [illegible] in the law is very rigid. A testator once gave to the son of a wealthy man a minute legacy; the Ex paid it to the father, the son afterwards [illegible] made with the father, 10 years afterwards they parted; & the [illegible] recovered this money out of the ~~[illegible]~~ Ex. 1 P W 285.

~~As to a legacy to a wife~~. If it is not given to her sole & separate use of the wife, it is the husband's: & this whether he reduces it to possession before ~~either his or her~~ death or not. But where it is given to her sole & separate use, it is entirely out of his power.

2 Vern 261. 6 Mod 408: 5 Mod 69: 1 Atk 115.

As to the time of paying legacies when no time is fixed (& to whom interest is) it is [illegible].

[illegible]

[illegible] Legacy [illegible]

If the legacy is called for at any time after the expiration of the year, Interest is due from the time of such demand, until paid.

[illegible]

Legacies to infants, [illegible] are [illegible] after the year [illegible] 2 Atk 515. 1 Ves 281. Prec 161. 61.

[illegible] of [illegible] Legacies to [illegible] to be paid before 21, & [illegible] for their maintenance [illegible]

[illegible] is [illegible] duty of executors to provide for their children until they become of age. There is no [illegible] legacies [illegible] to persons to be born. [illegible] Testator [illegible] 9 Atk 329. 2 Atk 161. [illegible] 305.

The difference that exists between legacies [illegible] the rule for allowing [illegible] is probably owing to this; [illegible] it is then duty to call upon the [illegible] for his [illegible] The reason [illegible] in this case is that he has received advantage from it. There is no [illegible] it is not [illegible] to call upon the legatee.

Of the [illegible] of legacies, [illegible] legacy in the [illegible] legatee [illegible] are [illegible] legatees [illegible] on the [illegible].

If it is not always certain, because a testator has [illegible] a legacy, that he intends to deprive the legatee of the advantage of it by the [illegible].

~~Cases where allowing the disposition would~~ ~~repeal the person.~~ If for instance a testator should give a legacy, a person (B) if [illegible] before his death that the person against whom he had the grant [illegible] [illegible] to [illegible] Marriage, that is, ~~in consequence~~ in consequence of his [illegible] marriage, & determined to the contrary the marriage, & took the legacy; in either of these cases [illegible] would not be sufficient to defeat the legacy of the annuity. B, if he [illegible] & without any other circumstances [illegible] the money, this would be sufficient to defeat the legatee's claim. ~~[illegible] would be sufficient [illegible] that it was the intention of the testator to defeat the legate, & the [illegible] or [illegible] of the fact. This is regulating the construction of Wills.~~ [illegible] Bap.

There are another set of cases where legacies are impossible to repeal. For [illegible] a man gave to his wife [illegible] to trustees [illegible] with, & afterwards built it for [illegible] so that when a man gave in his will [illegible], afterwards ~~[illegible]~~ [illegible] it personally to the legatee. [illegible] 63.

There are some other cases where a legacy is defeated by the [illegible] a will & it was afterwards [illegible] down & a new one was built. This was [illegible] to undergo [illegible] this was not held to be sufficient to defeat the will.

Conditions to legacies, which [illegible] marriages are ~~[illegible]~~ generally speaking void. [illegible] a legacy is given on condition that a person will not marry, or will not marry until an unreasonable time, or will not marry any of a particular profession & even to have the restraint [illegible] that the legatee should not marry [illegible] the condition is void. ~~[illegible]~~ ~~[illegible]~~ ~~operate here by [illegible] the [illegible] was that a [illegible] should not marry a [illegible]~~ That a condition that the legatee would not marry a [illegible] person has been held [illegible].

Such a restraint upon a man's wife who has children ~~When a testator leaves a legacy to his wife, if he knows that she has children, and the legacy is left to her, it shall be paid; for there can be reason in this, as when the testator has given a thing, he will expect to be master of his own, & do what he pleases with it, & no one ought to controul him in it.~~ 1 Vent 79: 2 Mod 86.

~~A legacy is repugnant~~ A condition that the legatee shall marry without the consent of a certain person is void. ~~The condition is to be totally void.~~ But if the legacy ~~then vanishes~~ was limited over to another person, he will take it. Salk 302: Pr Ch 565. 2 Ch 565.

No technical words are necessary in a bequest of a legacy, as there is in a devise of real property, it is sufficient if you can collect an intention from the instrument, that the testator would wish the legatee to take. 1 Vent 467.

It is a common thing for a testator to devise the power of distributing property amongst his children &c. If this power is monstrously exercised, Courts of Chancery will interfere & restrain the excess. 2 Vern 513: 421.

A present will of personal property, will effectually operate upon all property of that kind which the testator may then possess of; but it is not so with real, no other goes by the will than what the testator was possessed of at the time. 1 Salk 237. But when the words are not general as "all his personal property" but "all to wit be here in such a house", all wills passes which is in the house at the time of his death.

These rules upon personal property are provided upon the difficulty of identifying what property he has at that time. 1 Ves 530.

There is a difference in the application of legacies when they are given to the children of a man to whom he has, & has not any. In the first case

Only those which he has at the testators death take, in the latter all which he may have at any after period. Co Lit 112. Pr Ch 470.

If man made a will & gave certain property to the children of A & B; & had C, D had E, it was in this case decided, that C's children should ~~take~~ take, not half, but per capita with B's. 7 Ves 40.

Grand children ——— stand in the place of their dam while any of the old stock are living. 7 Ves 10.

When a man leaves property to be distributed among relations, the word relations must first be construed to mean, only such as would take under the Stat of distributions. To ascertain who such relations are, see Blake the Lord of Administrators. Pr Ch 400. Talb 251. 1 Vern 53 pl. The additional word. pers. makes no difference in the distribution.

Is the Ex obliged to pay out of the residuary legacy, to plead the Stat of limitations? It has, & rightly been decided that he is not.

Of the manner of getting at their legacies.

In by the Ecclesiastical & Chancery courts are the proper ones to sue for their legacies.

Chancery is sometimes the only proper court, as when lands are ordered to be disposed of for the payment of debts & legacies. Vet 289: G. Pl. 270: 364: G. Ch 16: 2 Ch 50.

When in Eng & this country an Ex is sued for a legacy or a debt, he is charged as being executor, and judgment issues against property which he has as executor, and in his own right, if the Sheriff returns that he can find no property of any kind, ~~the ex~~ he can issue ~~execution~~ against his body. But Executors may by their own engagements become liable in the first instance & this proceeds upon Com Law, the promises by parol, tho' by a Stat he is now not bound by a parol promise. This appears to be the reason why executors should

be bound by these promises when there is no consideration, more than in other cases.

He thinks that now-days a parol promise is binding, & was subject then to this process in the first instance, if he has assets in his hand. 6 Geo 6 c 6 q: 1 Ing: 2 B Reg 937.

There is one case where legacies could always be brought in the Com Law Courts. viz – when legacies are charged upon land. see above authority.

With respect to the manner of recovering legacies in Connect. In all cases bring an action against the Ex in the Com Law Courts: the principle are [illegible] the Ex to pay so much money. This is the defense which the Ex may make.

He is not obliged to show [illegible] order unless he has assets. If he has not enough to pay all, in proper manner, & tender this condition [illegible] If there is property enough to pay all, yet if the legacy is specific & the actual has perished he may plead that.

If lands are devised for the payment of debts, & there is property sufficient without ye L. to make payment, & there does not remain sufficient to pay the legacies without selling the land; what is to be done? The rule there is that the legatee may run upon that land. 3 PW 322.

If a man orders in his will that certain pieces of his real estate be sold & there remains a surplus, what becomes of it? It is considered as a [illegible] the lands of the Ex for the benefit of the [illegible] 1 Vern 45: 2 H 74: 77: 1 PW 9: 550: the [illegible] 2 Atk 229.

Judge R thinks, that in Con the Ex is not entitled to the residuum. In Eng the Ex is not allowed any thing for his trouble & this is given as a compensation, [illegible] paid. It is evident that it is there given for this purpose, for [illegible] are not entitled to it & if there is sufficient given in the will for a compensation the Ex are not is not entitled.

A present made by a dying man is called Donatio mortis causa, it is not a legacy; [illegible]

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a gift so that he can take it immediately. For these donations there is always an implied condition reserved, that they will not go if the testator recovers. But to these presents there are no restrictions. — They can not be made in the nature of a pecuniary legacy; there must not only be a gift but a delivery; — and these presents are not altogether out of the power of the Ex, he must take possession of them, if there is enough without them to pay the debts, he must be delivered them, otherwise he must deliver them. But their gift is preferable to all creditors against. For these properties the Ex cannot be sued as an Ex, but as a trustee of certain properties of the testators. 2 Peny 231 & my authorities cited 1st Ser 56.

Of payment of Debts

There are cases where the Executor or Admrs. cannot maintain actions, when the testator could; and on the contrary, there are cases where the testator would be liable when they will not. I find before we come to consider the payment of debts it will be necessary to consider them.

At Com Law in all personal actions the Executor and administrator, and here it would be convenient to observe that the law is the same as to Executors as administrators, stand in the place of the deceased. Co Lt 377 - Latch 167.

In real actions the Ex can bring the suit if the covenant was broken during the life of the testator, otherwise it goes to the heir, or to the person

who is in possession of the land. As when a person covenants, that he will deliver or secure the testator in possession of lands which he has sold him. 2 Levy 26 - 1 Rent 175 - Palm 118.

For injuries done to a man's person or estate, the Eccl. Law allows of no remedy. There is however an ancient stat. that in some measure remedies this - 13 Edw 1. It was then enacted that when a man did any damage to another's land & carried the spoils away, that the right of action should survive to the Executor. It then became a question what was to be done supposing the things were not carried away? - The equity of this stat has been extended to embrace these cases. We have no stat upon this subject, nor have the other States, but it has been received in all the States as a law. Moor 600 - Cro Eliz 577 - Latch 167 - 1 Rent 187 -

What is to be done both root in arrear? By Stat 33 Hen 8 - he may sue for it. But this stat was unnecessary, for as it is as a covenant broken in the testator's life time, it of course survived to the Executor.

Injuries to the testators person or reputation stand upon the same ground that all injuries formerly did, the Ex cannot sue, to recover the damages.

As to the torts of the Testator it was formerly held that the Ex was not liable, but this is now in some measure altered. It is now held that the Ex is exempt from this liability only in those cases wherein the Testator derived no advantage. When the Testator had thereby been benefited the action was sustained as in tort, but for the value of the thing, according in contract. 2 Mod 253 - 1 Salk 314 - 2 L. Ray 871 - 1502 - 2 Vent 30 - Comyns Hamlin vs Pott.

In Eng there is a priority as to debts and they must be paid according to their rank. Their order in the country is as follows — 1st Crown Debts — 2. Debts contracted in the last sickness and which is their expense. 3. Judgement Debts. 4th Bonds or Specialty debts. 5th Simple contract debts. If the Ex shows pay any of them out of their order, excepting in certain specified cases, he is still as much liable as ever. But amongst debts of the same degree he may give the preference to which he chooses. Also if after thus doing he is sued, he may plead that he has fully administered.

In Con there is no priority allowed to debts except those contracted in sickness and under one that it remains a question whether it is all debts or only those contracted in the last sickness which are allowed the priority.

In case the estate is insolvent or there is the least probability of its being so, the custom is, for the Ex to make such a representation to the Court of probate, the Court will then appoint Commissioners to liquidate the debts due from the estate. In the intermediate time the Ex goes on to discharge the debts due and ascertaining the extent of the testators property. How far this liquidation of the Commissioners is binding will be seen hereafter. Whatever the commissioners allow they represent to the Court of probate, as the Ex does of the amount of property. If there is personal property sufficient for the payment of the debts that must be sold; if there is not enough of them, the Court will order the real property to be sold to the extent required. But if the estate is in fact insolvent then the Court will order an average to be struck amongst the creditors. And this average is to take place as a compensation of the debt. If there is any real descended estate, the Ex makes a representation

At the worst, when each stands on his own merits, it must be left to the creditors. There are numerous being shall be in a position to proceed to extremities till their debts are satisfied. If there were many of creditors who wished to lay on their claims the debtor was [illegible] to an average element. An average being the [illegible] of the [illegible] by [illegible] to the average equal to the [illegible], and the [illegible] average will be [illegible]. The exclusion of these creditors who were [illegible] in the first place, is not upon the grounds of fraudulent but expediency. — There will then be, as is [illegible] from what has been said, no [illegible] of the [illegible] debt. But if after [illegible] the estate to [illegible] to [illegible] [illegible] [illegible] [illegible] a question what is to be done? In the first place it is the [illegible] of [illegible] the [illegible] of his debt. This is not the case in bankruptcy when there is a [illegible] to [illegible] and then [illegible] and a suit may be commenced upon the bonds. Another method has been proposed, viz. for the court of [illegible] to appoint another. — The [illegible] of debts found by the commissioners is the rule for the court appointed to act. The [illegible] but still this feature is not binding upon the [illegible] he may [illegible] any debts which [illegible] to be improper. — The creditor has no remedy after the [illegible] has [illegible] his claim. But no [illegible] of fraud to attend this, for they usually allow [illegible] of the claim is [illegible] to have it [illegible] the [illegible] to respect it. This decision [illegible] is vested in the commissioners, to prevent perplexity & [illegible] contests in letting [illegible].

When a man has secured himself by great diligence so as apparently he cannot be compelled to surrender up his security.

But what is to be done when a man has [illegible] and has allowed property by the [illegible] to be compelled to surrender up his claims on his property & [illegible] average?

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If he offers to restore

If he offers to restore the property received, and the creditor has neither accepted it nor the intermediate rights of intervening creditors, it will be treated as if he had a right to do so, inasmuch as the fiduciary being in possession of his creditors, whether fraud is practised upon the creditors intervening or not. But being intermediate there may be some intervening rights of increase or profit. But being intermediate these rights make an [illegible] of his own money. When the intermediary has been secured or expended on principles, as a prudent person properly takes friendship or humanity. But where an [illegible] has accepted this office or an [illegible] has been appointed, a man cannot be [illegible] in such money, but he becomes a trespasser and is liable to be treated as an [illegible].

He is not [illegible] responsible not only for the [illegible] of property he has received, but liberation is subjected to an action by the [illegible] is [illegible]. This pleading that he was [illegible] of the property he has received for the payment of the testators debts will not abate the suit, altho' it will the damages, he will still be liable for [illegible] money, and this will depend upon the motives, whether fraud or [illegible] induced him to interpose. [illegible] 31-33 - 1 Hall 618 1 Str 313 - 2 Mod 179 - Cook 109. [illegible] 650 -.

There are cases to be found where the [illegible] of an [illegible] was compelled to pay the [illegible] of the property received. But this was not upon the principle of his being [illegible] of his own money; but for false pleading which evidences fraud. i.e. when he pleads that he did not intermeddle [illegible] any property, when the contrary is a fact. And his liability in these cases depends upon a principle of penalty, which is often [illegible] [illegible] 419.

If a man gives a gratuitous bond, this in [illegible] must not be paid till all the debts for which [illegible] consideration are, on the other hand [illegible] to be paid in preference to all legacies. There is accordingly

~~Where~~ what is the nature of these bonds the Defendant said with great difficulty. It is to say the bottom was for the Defendant to pay a bill to Chancery rolling to the creditors for a valuable consideration and they otherwise consider making the joint creditors & the voluntary creditors, in the Defendant does not appear as a party. It was a suit for their interest.

What is to be done by the commissioners with these bonds? If these will be taken be enough this ~~I~~ supposition to satisfy there will be no difficulty as to what is to be done. But this is always contingent as to commissioners who are appointed upon the presumption of insolvency. If they receive them, they will be entitled to an average with the creditors for a valuable consideration and perhaps to their surplus. If their ~~claim~~ claims are thrown out they can have no hold upon the residue. — Judge Reeves thinks that they ought to be admitted as voluntary creditors; then they will be paid if there is a residue & not otherwise.

It has been before observed the Defendant may give the preference to their own debts to those of the same rank; but now they must take their average, paying themselves in both cases.

In the books it is laid down broadly that the Defendant is exonerated from his debts, by being made Defendant. But this must now be understood ~~broadly~~ with qualifications. It is not discharged to the disadvantage of creditors. And it is likewise assets to pay legatees. So it appears to stand upon no better ground than that of a residuary legatee claim. And as he would be entitled to no residuary if a legacy was given him, he thinks that in such a case he would not be allowed the debt. — But then there is no such case that he must distribute when he has a legacy. — The reason of the residuary being so by allowed as a compensation, when they are not law entitled, it would seem that he would not, as they can be entitled to the debt, he paying to the

legacy that which satisfies the reason. — It is otherwise said that it is implied given when appointed by, because he cannot see himself. But an ED cannot see himself yet he is not by such an appointment the legatee from the dett. — But in Con this cannot be case he very entitled to a compensation. 1 Atk 301. 5 Ves 30 — Hob 10 — Co 2 173 — Yelv 160 — 5 Co 156 —

There is such a thing as an ED nominated to have the to will not act. The will in this case is the law of the ED, and he differs no ways essentially from the to. — The ED must possess power the will before he can do any thing; it means the to can do every thing without not formally but to sue & recover.

Who is entitled to be ED.

There are certain persons entitled to be EDnominated, and their appointment does not entirely rest with the testr.

This is by reason upon two Statutes. 1. Ed. 3 In most of the States they have been similar to these.

First here it may be asked if there is no Con law upon this subject? 1 Atk 100. Lev. There was no such thing as to be ED. It was in early times note that it was the the kings duty to see that the dettr was distributed, a reasonable part being given to the wife; a reasonable part to the children; a reasonable part for the payment of debts & for pious uses. The king substituted the bishops as his officers in this business. Under this conception crept in as to the use of the word that was for pious uses & debts. 3 made a distinction the bishops to appoint ED when there was no ED and it became their duty to see to the payment of debts, and they were accountable for total assets, administration to creditors. This S declared that the wife or next of kin should be appointed administrator. In calculating the total assets the first mode of computation is followed. When there are several in the same degree of kin, they are entitled with the ordinary or probate to appoint which they may think proper. 2 Atk 100 — 504 — Ves 552.

When there are several equally near of kin the stray goes part of the administration to one & goes to another. As when there is property in different towns the stray goes and the rest of property in one town to one & in the other town to the other. But we have no such Rule. Judge Hamner thinks however that they must be each liable for the whole 1 Rolle 908 - 1 Sid 36 -

Next of kin in the descending line is preferred to next of kin in the ascending, but the right of representation does not hold here.

No preference is given to males over females, unless the female is married.

The right of Ord. passes often fails upon witness or improper witness. When the issue of the is a material witness then never be made Ord. If there is granted to another rule to answer at twenty one. And if the estate is not settled by that time he is dismissed with ye Ord. Prerogative, and will proceed to the settlement of it. The Ord appointed during his minority is called Ord - Durante Minore Aetate. 5 Co. 29 - Hob 251.

If the relatives will not act, it is then in the duty of the Ordinary to appoint a Creditor. It is necessary so to do lest there is no Compositor. 1 Rolle 907 -

If two persons are appointed Ord. and one survives the other, all their joint powers survive to him. But this survival of power with Ord is not equal to other powers where more than one are appointed to the executors or to powers of attorney, the survivor has no power to act. Hob 196.

The Ord or person who has a right thereto must apply to the Court for letters of Ad. In this it is required that he should swear that he is next of kin to the deceased and that he believes he dies without a will. But this is then proved by witnesses and does not rest upon his testimony.

What if the next of kin is an improper person? The that could not have reason to have executed

such cases with power: and it would be proper for the Court then to act discretionally. It may be there to have to look and that the fund ~~may~~ sufficient security ~~for~~ against those debts, but they cannot apply in Eq.

The conditions of the bond are that he will administer the estate; that he will administer justly & according to law. That he will distribute it to such persons as the court shall direct; and that he will render a just & fair account to the court.

So in law must give bonds as well as in Eq; but in Eq. he is not obliged to, unless specially required by the court, and this happens only in cases where there is a want of confidence in him.

The bonds are never taken separate consider with the Court.

The court can here the right to administer upon his wife's estate. But he is not obliged to do so, he may be destitute the widow of the intestate after paying the debts. This is founded upon the act of 29 Chas 2. in Judge Reeves Abridg. [illegible] the law is very such to expressly in him they have a Similar Statute.

If he does not according to the requisites of the bond made out he may be prosecuted & damages; likewise if he does not make out an account, and if he does not distribute according to the directions of the court.

But for not paying the debts, the bonds are not forfeited, the persons of the ex are liable for them. This is the Eng law. 1 Atk 316.

The practice varies a little of a creditor should see the Ex in it & not be able to obtain the debt from him then he may come upon the bondsmen.

There are cases where the ex can be removed, and cases where he cannot. When a will has been found after letters of adm have been granted he must be removed. When a wrong person has been appointed he must likewise be removed.
And he may be removed when he has become a lunatic, or improper person to administer.

But they are appointed and their commission [illegible] in many purposes legally executed their functions. They are not liable to an action of trespass to be sued to the creditor [illegible] of their warrants for an [illegible] power from the Court. But from the moment that this power is [illegible] to be [illegible] no further.

There is yet by a difference between Sd & Pt. When they are [illegible] or [illegible] they [illegible] both act with selling property & in making a release of debts; but one of the Sd is sufficient for these purposes. [illegible]

What is to be done when a deed has been [illegible] ~~[illegible]~~ an [illegible] or [illegible]. At Common Law it was [illegible] the Plff or Dft died the suit abated. But this in by law has been remedied by a Stat of Mod[illegible] Eng. This Stat has been [illegible] in [illegible] & most of the other states. By this the Sd may come and enter their [illegible] as Plff as Dft, or all such suits as they could [illegible].

If the Dft dies, at Com Law the suit abates, and a new action must be commenced against the Sd. But now by Stat the plff may continue as against the Sd executor to recover & defend it.

If the Plff dies [illegible] the Sd [illegible] not [illegible] to enter his name as Plff, as [illegible] in the case, when the plff cause was a [illegible] [illegible] must cease has arisen, what then is to be done to relieve the Dft? There is no [illegible] for the Dft.

There is upon this subject a little difference between the Eng Stat & the Connect. There Stat speaks of any cause that has been returned on court; mus ~~only~~ of such as have had the trial [illegible].

It is a general rule [illegible] real property goes to the Heir & personal property to the Ex. But there are some things which appear to be real to heir in [illegible] they are in [illegible] personal & some [illegible] to be personal which in law are real. [illegible] appear to be ~~real~~ personal [illegible] considered as real [illegible] heir, [illegible] [illegible] heir is a personal representative the heir at least some [illegible] accounts

after the testator's death. Instruments, even
the often treated as real are to be preserved as to
the Ex. See Lat 55 - 2 Wh. 122.

It was once a question whether a [illegible]
[illegible]. Co. 9 Pl. say in the Exp [illegible]
[illegible] in the Exchequer.

Otherwise indeed, in real property, the
old rule was that every thing that was
annexed to the freehold, was by a strong constructive
property. But this idea is obsolete. The rule now
is that [illegible] only as real as cannot be
removed with damage to the freehold. Cit 15

There is a specious notion, which neither
is nor has been. by Paraphernalia.
Women are of three species their heads, necessary clothing
that is necessary for the rank of the husband; and
necessary bedding.

There is another species of Paraphernalia which
which does not for [illegible] Jewels to the Ex. [illegible]
by testaments. That if there is a sufficiency of
personal effects for the payment of debts, they
are their limits.

The first species the husband may use but
[illegible] for his life time: Nor can he dispose his
[illegible].

If the paraphernalia is taken in payment of
debts, the may recover their value out of the
Ex. And if they are pledged for the payment of
debts, she may, if there is property left after
the payment of debts, ~~[illegible]~~ redeem that property &
redeem them. Cit 3 Bl - 396

Mortgages in the hands of the mortgagee, are
after the day of payment has passed, appurtenances
of real property, at least it is so in law.
But it is not so in fact. It will pass [illegible]
as personal property; and if the land is redeemed
it must be paid to the Executor. Cit 1 Wh 122
[illegible] all personal property passes to mortgagee.
But [illegible] happening it will not pass [illegible]
[illegible] there is no ~~[illegible]~~ real property, the [illegible]
When the [illegible] is in by Sec. and the [illegible]
the [illegible] they pay the costs of the [illegible]. [illegible]
[illegible] the law.

This is entirely in a regular course of Probate, to proceed by the testimony of witnesses [illegible] probable. By the Civil Law it was very deposition, and the issue of Witnesses [illegible] Stars were made, it was said that no [illegible] in proceeding allowing costs. After this a case was decided allowing costs in many cases, when followed by that of Gibson which contemplated allowing costs the Mass cases, this being deposition is in the object a case of Ellen & Jones made allowing costs in all cases where a man sued for his own right. The Court stating in this case Right done Still left a the case [illegible], proceeding against the testimony in this Act.

The Ju is [illegible] as presumably [illegible] for costs unless the Court of Probate Chancery is allowed [illegible] which they will [illegible] of the Court [illegible] Jurisdiction.

If by [illegible] spring [illegible] to this [illegible] right, he is liable for costs. Sha 682.

Equitable assets are such as the Ju cannot reach himself without the interference of a Court of Chancery. As when a testator devises real property for the payment of his debts, & the persons appointed to sell & dispose of it do, then the Court will order it to be sold. In whose the interference of the Court is necessary, they are equitable assets, in other cases they are real. In the payment of debts out of equitable assets the proof dues on be cause is allowed. 5 P W 301.

If a man is his devises property, ~~with~~ specifically ~~[illegible]~~ specific legacies, debts, this is [illegible] equitable but legal assets. [illegible] the person of the Devisee of the receipts of the devisee is liable for them. 2 P W 506 —

The proof that the Ju has released certain debtors proves them devisee sufficient to prove that he has such assets, or has received them. [illegible] 712 — 1 Vern 67.

[illegible] Thinks that the Devisee may

dispose of their personal property by will or deed, but upon this subject authorities are different. Lord Ch. Eldon says that devise is the age law that is so founded upon the civil law. He in Ecc have fixed it at sixteen.

When an thing which can be disposed of by deed which is sold by will. Is chosen in action [illegible] tenant. There is a law of Lord Ch. Eldon that if the chosen in action [illegible] disposed of by will, he has left [illegible] to prosecute, he can after revoke them.

Joint tenants cannot devise but may dispose of the property by [illegible]. In Ecc we have no jus accrescendi. But if they have [illegible] tenancies [illegible] state.

This rule of devising [illegible] of transitory property held by merchants as joint tenants can be devised; & so with partners. Co Lit 182 - 2 Ch. Ca 377.

Personal property may be devised but [illegible] to create a perpetuity. — What is [illegible] perpetuity? —

Formerly it was universally held to be as to chattles real and personal that there was no such thing as an entailment. But upon this subject a new Com Law has grown up.

There are two kinds of chattles, real & personal. Real are such as appertain to the inheritance as fee. Personal are such as are removable.

As to Chattles real; — They may be given away as remainders, so that they happen within lives in being. As where lease is given to A, remainder to B, remainder to C &c all being in esse at the time of donation. 2 Bl 174

As to Chattles personal. — When the use of personal chattles is given to one, the remainder may be given to another, in being at the time of the

testator's death. This was the first [illegible] prove the Will. It was objected [illegible] that it should be limited [illegible] time of the testator's death [illegible] into the [illegible] to the [illegible]. — But this idea of limiting testamentary power in personal property has not been adopted in this State. 2 Revised Stat. 55 117 - 2 Dev. 120.

When personal property is bequeathed, the life devisee should keep an inventory with the court of ordinary: and if he is an [illegible] the Court of Chancery may require bonds.

Men who cannot make a will of real, cannot of personal.

The presumption in all cases is that the will is good, and it lays upon those who challenge it to prove the contrary.

Insane persons may make wills, but the presumption is against their being capable, and it lays upon those who would support it to prove that it is valid.

Aliens may make wills of personal property, and may depose to alien friends the rest to enemies. 5 Ch. Co. 372 - 2 Dev. 174.

As to wills of personal property, see as to deeds of agreement. The hand writing of the testator is sufficient, and even if the testator has not signed the will, yet if it is written in his hand writing it is sufficient.

If a will is so made as to be void as to the real property, yet it is good as to personal. Judge R. - Thinks this is wrong.

Wrotten or Non Cuperium. They are treated as real. As to personal the old common law rule is that when there was no testator nor that appointed they were allowed. But by a Statute of 29 Ch. 2. they were laid under many restrictions. (Not allowed when the person was at home ready to return to stand as the [illegible] shall seem as fit; when done by [illegible] or [illegible] strength of [illegible]; [illegible] [illegible]. [illegible] have not been in the habit of allowing them.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] in Con

[illegible]

[illegible] Till [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Of Contracts

[illegible]

When can Contract

[illegible]

[illegible]

Lunatics

(1)

(2)

(1) See Powell on Contracts where this subject is thoroughly considered.)

(2) Drunkenness is not a ground for avoiding a contract at law, but in Chancery it is provided the ~~for~~ obligee was made drunk for that purpose.

It is an undecided point whether a Court of Chancery would relieve an obligee in a case in which the obligee found him drunk & took advantage of his situation.

If the contract was fair, Chancery will not relieve, altho'

the obligee was a mere trustee for the purpose

of conveyance

If advantage is taken of any

Altho' there

Chancery will relieve

Of rescinding Contracts.

2 Mutual Mistake and Ignorance

parties,

ing

re not

Mistakes are not always to prevent

relieve

Mr

Eliza

here

a person

Mr

Mr

Mr

Mr

But where there is no contradiction to party's

will relieve

as

a Court of Chancery will relieve

Daughter

his

his

Mr

appeared

half of the entire amount of £4000 &c.

avoided

to

release

[illegible]

[illegible]

[illegible]

(1) As if the vendor warrants an horse to have two eyes when one of them is out. This rule is founded upon the principle of Caveat Emptor.)

Dunp 24: Comp. Pennsylvania

will at law recover against Powers as Walker.

It is immaterial whether the suit for damages by fraud is brought for fraudulent practices, or for damages. 1 Wells 61 – 1 Wils – Ainslie 252 – 2 Wils 359.

If the warranty be binding when there was any consideration for it, but not when there was none.

If the warranty was to affect, it is not binding.

after the offer of warranties

warrantee

310

It is necessary that the warranty should be made at the time of the bargain. Story Sales. 10 J. 632.

~~It is false affirmation of qualities~~ [illegible] under a warranty of the qualities, his good [illegible] them [illegible] of a ~~person~~ ~~affirmed~~ goods to properties which they did not, ~~and [illegible]~~ had ~~knowledge of their not possessing~~ [illegible] he was ~~not liable on an action~~ upon that warranty ~~[illegible]~~. And now it is more reasonably held [illegible] ~~[illegible]~~ duty to know [illegible] ~~[illegible]~~ before the ~~[illegible]~~ affirmation.

If a ~~man should~~ vendor is agent [illegible] that land which [illegible] ~~[illegible]~~ [illegible], when it ~~[illegible]~~ rented for [illegible], it is a fraud; but if he only expressed an opinion to that effect it is otherwise.

The affirmation that a thing is contained in what every person is aware of, ~~is of [illegible]~~ is not subject to an action. Holt 90. 10 J. 163. 1 [illegible] 146. 1 [illegible] 102. [illegible] 126.

~~[illegible]~~ the goods are sent the vendor ~~selling~~ an action will lie upon an implied warranty that they were ~~[illegible]~~. [illegible] 60. [illegible] 90.

[illegible] concealment is ~~[illegible]~~ now held to be a fraud as a false word ~~[illegible]~~ that it was otherwise formerly.

~~[illegible] ~~ ~~[illegible] in~~ ~~op [illegible]~~ (1)

~~[illegible]~~ There are cases where the fraud is not ~~directly~~ direct, but is only to be inferred from the circumstances. ~~As~~ when the injured person was [illegible] induced into the contract of a bargain ~~[illegible]~~ in [illegible] ~~[illegible]~~ the ~~[illegible]~~ peculiar situation, it appearing that there was hardship practised. Or when there is gross inequality of gain. But these things must appear very plainly to be relieved against. [illegible]

~~[illegible]~~ — The extent to which ~~[illegible]~~ Equity goes in [illegible] ~~[illegible]~~ ~~[illegible]~~ is not distinctly [illegible], the law must be gathered from the general [illegible] ~~[illegible]~~.

((1) If advantage is taken of the peculiar situation of a man, as for instance if he is imprisoned & in miserable circumstances, Equity will prevent relief. 2 P. W. 203. 3 Ch 290 & 390.)

(1) Chancery also relieved in a case in which a young person who was imprisoned & in great distress gave a legacy of £100 bequeathed formerly for a very trifling crime, which was left him provided he outlived an old woman. (Litty. 9 Ver 290.)

Where inequality between the vendor & purchaser is not a ground of relief. ✗

a mortgage

against a

provided the estate was not mortgaged in a certain time

(1) Also in which where

in great distress sold a legacy of a hundred pounds for which was left

was provided he received an old sequestration of rent.

the legacy

Nevertheless upon inquiry appears the Court

Thoughts have they made.

in which the case proved

Nevertheless

Attorney

[illegible]

[illegible] and in hand

[illegible] of these grounds.

Does this rule so far [illegible]

man

[illegible] brought [illegible]

[illegible] the legacy [illegible]

[illegible] judge's [illegible] that the testator [illegible]

was [illegible] [illegible] was taken

[illegible]

Being [illegible] the praise or law in the following year.

A man agreed to sell another a house upon

condition that he would give him a barley corn for

the first mail, two for the second, & so on [illegible]

than a hundred [illegible] seals. The Court [illegible]

[illegible] the jury to pay only the value of the

[illegible] 1 Lev 111 – 2 Vernon 182 – 1 Ventr 237 –

[illegible] — in which Chauncy will believe it.

[illegible] upon the person, but upon a third person.

[illegible] subsequent [illegible] made [illegible] uttered [illegible] for [illegible] an agreement [illegible] operate to the injury of the [illegible] creditor. 1 Salk. 156.

In this instance, the father of a young lady refused to grant an [illegible] for [illegible] marriage [illegible] the father of the lady [illegible] promise [illegible] said [illegible] himself from a certain obligation, but [illegible] case [illegible] and entered into an agreement to discharge it, taking at the same time from the young man a second obligation for the amount which they found themselves, the court [illegible] not that [illegible] suffer [illegible] recover upon it [illegible] it would have been an imposition upon the father. 1 Vern. 348 – 2 Bro. Ch. 375 – 2 Vern. 602 – 1 Salk. 156.

If a [illegible] debt [illegible] and it is transferred [illegible] the obligee [illegible] the [illegible] to this third person [illegible]

On this question it was contended in Chancery by one side, that the assignee being a bona fide purchaser ought not to be disappointed by a bargain which upon the face of it appeared good. On the other hand it was said that the original giver of the bond ought not to lose his equity, by an act (2) upon the subject of [illegible] other [illegible] depending [illegible] conditions, or alienation by Deed.

Of contracts obtained by Duress.

Duress is of two kinds, viz. Duress of Imprisonment and Duress per minas. Duress of Imprisonment is where a man is imprisoned merely to compel him to make a [illegible] contract, but any material detention, or threatening the person of Love and Fear.

Obligations [illegible] obtained by duress of imprisonment are void in all cases, [illegible] the [illegible] actually due to the amount of the

(1) ~~Cut of the assignees, The question is now settled, that~~ The bond passes with, ~~The~~ equitably ~~the obligee~~ to the assignee, & the ~~Therefore the who first the bond~~ may ~~assign~~ rescind it as well ~~before~~ after as before assignment.

all its obligor

10 W 496.

(2) It has been determined in Con that where A sold land to B, who gave his note to C, a creditor of A's, then notes given to C were good against B altho the land which he bought of A was mere moon shine ~~[illegible]~~, & had ~~[illegible]~~ & A they ~~might have~~ been avoided altho assigned to C.

~~There~~ Are two kinds of contracts which as against creditors are fraudulent. 1 Voluntary Contracts. 2 When they were entered into with a ~~[illegible]~~ demand creditor.

Voluntary contracts are void against creditors upon the principle, that a man must be just, before he is generous. But such contracts as between the parties are binding ~~because the consideration is good in~~

Fraudulent Contracts are binding as between the parties. But voluntary & fraudulent contracts differ in two respects. 1 Voluntary ~~creditor~~ contracts are good against all persons, provided there was at the time of making them a sufficiency of other property to pay the debts. Fraudulent contracts do not bar the creditors from coming upon the property whether there is other or not. 2 A voluntary conveyance is good against all subsequent Creditors. A fraudulent Conveyance is not good against debtors either subsequent or antecedent. See Hollingsw. v. Spirit.

If a person owes another £100. & conveys to him property worth £1000 upon the condition that he will reconvey it back to him, when he pays £100. Such a conveyance is fraudulent against creditors, & be the full amount of £1000, for he might have taken a mortgage for 100 £.

There are cases where a contract is fraudulent altho a full consideration has been paid. Viz When a man in failing circumstances prevails upon a person to purchase his property to enable him to abscond.

Or alienations by Deed

(1) Quer. If the man was under duress at the time he signed & sealed the bond it was not his act & deed. The circumstance of its being payable to a stranger does not vary that fact. If it was not his act & deed, or if these words if in contemplation of law he never gave his assent to it, it is no engagement of his, & consequently he is not bound. To say the law, would (in contemplation of law) be to say that a man shall be bound by a contract w.h he had never made. — Moreover it would ~~[illegible]~~ open a door for the complete evasion of ~~that [illegible]~~ the law of duress; for it would be clearly as convenient to procure a bond to be executed to a friend of the person held in duress, as to Kinsfolk. — By adverting to the authority supposed it will be found that it is not fairly supported.

(2) When a bond is given by a relative ~~to release~~ of the person held in unlawful duress, Chancery will relieve against it. But this rule must not be understood to extend to all relatives. — Those who will be allowed at law to avoid their bonds upon this ground are Parents, & Children, and Husband & Wife. 2 Brownlow 276. 1 Lidwyer 123. 1 Ld Ray 357. 9 Vin 317. 8.

(3) In some of these cases it was contended that the payment was voluntary. But it was truly answered that the rule Volenti non fit injuria, only holds when the party has the freedom of exercising his will, which he has not when his legal rights are withheld from him. Every thing exacted as a condition for refraining from an unlawful ~~act~~ or injurious act, falls within the same general observation. Lowes Essays 24. 2 Stra 915. 4 Term 485. It seems that the rule that no duress excepting duress of imprisonment & per minas only applies to deeds. This distinction grows out of the great respect paid to that instrument at Com Law.

[illegible]

Duress, or when afterwards is imprisoned is imprisoned by operation of law [illegible] Cowper 306.

[illegible]

(2)

[illegible]

Whether duress [illegible]

Duress of the person [illegible] Loss of Limb or Mutilation of his person, or of his life; or of his liberty. [illegible] of this description [illegible] Mutilation [illegible] Duress of the person [illegible] Threatenings of any other mischief are not sufficient if [illegible] would a contract at law. Cowper 319 [illegible] 202.

[illegible] compels them to execute a mortgage to a third person, it will be void, if, [illegible] the third person was privy thereto. 9 Ves. 321. Lucas (1)

The plea in suits for bonds [illegible] Were obtained in [illegible] not that it is not his act & deed but that it was obtained by duress. [illegible] Co [illegible] 119

Whitfield's Case.

It has however been decided that when money has been paid by extortion in taking extortionate fees by officers of the Courts, the detention of property pledged until more was paid than the principal & legal interest; the detention of a surrender by a steward of a manor, until an improper demand was satisfied; the extortion of a sum of money for restoring property seized by mistake, that it could be recovered back in an action for money had & rec.d. (3)

[illegible]

[illegible] Obligation is [illegible] it [illegible] Chancery will prevent relief.

[illegible]

If the parties at law supposed that [illegible] had it not existed a court of Chancery would relieve against it. [illegible] the [illegible] Contracts [illegible] mistake in [illegible] Contracts that are void therefore [illegible] defect.

[illegible]

[illegible] Contracts may become binding if confirmed when the complaint is removed. [illegible] Contracts void from the beginning.

(1) Unlawful contracts are of two descriptions. Viz. Such as are Mala in se, and such as are Mala Prohibita. The first are such as are morally wrong, the second such as are prohibited by the regulations of civil society.

Any Physical impossibility is meant what is impossible in the nature of things, not an impossibility arising from the peculiar situation of the obligor. That was made a ground of decision in Pl.

[illegible]

Not [illegible] in their last case

[illegible] could, but would the party at a loss for redressing the party themselves, in which [illegible] inflicting [illegible] it is [illegible] not [illegible] Adv. & Bonv. 1. 0. 97.

obligor

From performing his contract released from his engagement. other

a man [illegible] Assumpsit

[illegible] the [illegible] Studide

If [illegible] other act [illegible] illegal

[illegible] the party is not bound; [illegible] to this case the following [illegible] be [illegible] bound.

[illegible] This rule however [illegible] the

[illegible] qualification. If the party himself was [illegible] (some matter) it impossible for him to fulfill his contract, and he was prevented by an [illegible] for total, [illegible] found [illegible] by

[illegible] supposed, either for reason or else it was held to be [illegible]. 2 P. Nov. 1804 — 6 Mod. 305

The other kind of contracts. When the [illegible] exercise the [illegible] the [illegible] [illegible]

(1)

[illegible]

[illegible] Law [illegible] [illegible]

Unlawful Contracts.

(3) ~~Of this nature are marriage brokage bonds, or bonds given for the procurement of marriages.~~ &c

~~[illegible]~~ Contracts, made in restraint of marriage, are void in all cases. ~~[illegible] of making contracts of this nature by which a [illegible] would be [illegible].~~ 2 Wilson – Collins – Blackstone.

If the turpitude appears upon the face of the contract, it may be demurred to. If it is latent, it may be given in evidence under the general issue.

Many contracts are void upon the ground that they are against sound policy. (†) Of this nature are bonds given to Sheriffs for ease & favor. 10 Co 76 – 102. Cro. Eliz 145. 230.

Also if a man should engage that he would never till his land, it would be void, ~~[illegible]~~ as against ~~[illegible]~~ ~~[illegible] public policy~~. 1 [illegible] 105.

~~So agreements~~ not to follow a trade or occupation. But local restraints upon trade may be binding; as ~~[illegible]~~ not to pursue his occupation in a particular town. 1 P Wms 596. 1 P W 192. 1 Wils 242.

It is a general rule that no contract is good without a consideration. When a consideration is acknowledged on the face of the obligation, the presumption is that there was one; but the presumption is otherwise where there is a restraint upon trade. 1 P W 190 – 1 P W 192 – 1 Wils 242 – (4)

~~[illegible]~~ Contracts ~~that~~ having a tendency ~~[illegible]~~ ~~[illegible]~~ [illegible] unlawful [illegible] are void. ~~Where [illegible]~~ a clergyman laid a wager with a [illegible], that he would not be made a bishop, ~~[illegible]~~ the wager was declared void, upon the ground that it would tend to produce undue influence at Court. ~~[illegible]~~ Cowper 39.

And so also a contract of indemnity to a printer for publishing ~~[illegible]~~ libel is void. ~~[illegible]~~. Holt 12 – Plow. 68 – [illegible]

The rule that a bond to do an unlawful act is void, is not universally true. ~~If the law was unlawful, &c a bond [illegible]~~ ~~[illegible] in some cases~~, when a Sheriff is in doubt whether it would be legal to levy upon certain property, & a bond of indemnification was given, it was held good. ~~[illegible]~~. 1 Str 352 – Hutton 53.

A contract with an alien enemy is void, because it ~~might~~ lead to dangerous & impolitic consequences. (2)

(3) Contracts ~~comprehend two descriptions~~ 328
which fall under this head ~~two~~ are of two
descriptions. 1 Mala in se. 2 Mala
prohibita. The first are such as are
morally wrong. The second are prohibited
by the regulations of Civil society.

~~(1) Indeed this is a broad principle & embraces~~
~~many cases~~

(2) Policies of Insurance upon enemies property,
form an exception to this rule. (Such policies
cannot be sued upon during the
war. See Marshal on Insurance.)

(4) The presumption is also in favour
of a consideration altho' none is mentioned
expressed upon the face of the obligation.
This 2 Point is fairly inferable from
the following authorities. Hyde on Bills of
Exchange

(1) For instance, money paid to a person to do an unlawful act, which the undertaker does not do, here if the party rescinds his contract as he may do, before the act is done, he may recover back his money. Doug 654. ~~Chapman vs Pattison~~ Lowry vs Bourdieu.

(2) The security & contract are two distinct things. Every contract may be secured by a note, bond &c.

(3) Marriage brokage bonds, and contracts for the purchase of the expectancies of young heirs are the only contracts that are void in toto. upon the ground that they are against sound policy.

(4) ~~This rule is founded upon a statute in Eng. for avoiding lottery tickets.~~

(5) If the law which has been infringed upon was made for the protection of the weak against the strong, or the unwary against the unwary, — ~~the~~ ~~courts~~ Courts will enable the party injured to recover the money paid. — But if the party suffering was participes criminis as in cases of gaming &c. Courts will not grant relief under the statute &c. 2 Burr 1012 Fall. Cases 41.

Cases of Usury and of premiums for the insurance of lottery tickets (which practices rendered unlawful in England by a stat) are of the description of cases of oppression, fraud &c. Cowp 790.

(6) The rules that money given in illegal contracts cannot be recovered back relates only to contracts executed; contracts that remain executory are not embraced by it; and money paid may be recovered while the contract remains executory, & then it can only be done by restoring the other party to his original situation. As when a sum of money was paid to procure a place in the customs, the person giving it was allowed to maintain an action for it before the place was obtained, because the contract remained executory. Lowry vs Bourdieu 471. or 455.

The policy of the law in this case seems to be to keep the door open for repentance to the least from.

[illegible] ~~[illegible]~~ is against ~~[illegible]~~
sound policy, which is. Prov^d of the Pub^c or the expectancy of young heir, &
~~[illegible]~~ [illegible] are void at law [illegible]
They are against sound policy & are void at law: But are in
[illegible] [illegible]

Chancery! (3) ~~But then they may be avoided in~~ Chancery.

~~contracts~~ the of
~~[illegible] [illegible] the purchase [illegible]~~
expectancy ~~[illegible]~~ they are
are ~~[illegible]~~ void in [illegible] only & upon [illegible] [illegible] [illegible], (5)
[illegible] in Contracts ~~[illegible]~~ to [illegible]
[illegible] we [illegible], [illegible] [illegible]

~~[illegible]~~

~~[illegible]~~

~~[illegible]~~

~~[illegible]~~ 7

~~[illegible]~~

whereat

~~[illegible]~~

~~[illegible]~~

the ~~sanity~~ of the hand created, ~~[illegible]~~ acts of the the power of the [illegible], or

~~[illegible]~~

~~[illegible]~~ the

~~[illegible] the [illegible] as [illegible] of money, [illegible]~~

~~[illegible]~~

~~[illegible]~~

(5) ~~[illegible]~~ [illegible]

~~[illegible] contract has been [illegible] of the contract [illegible]~~

~~[illegible]~~ (6)

The money has been paid which in honour and conscience ought to have been, the court will not suffer it to be recovered back, altho' the payment of it could not have been compelled. As in the case of money paid by infants.
[illegible] 471 & 456

The security for a debt may be void yet the contract on which it is founded may be binding:
As in the case of money lent at play under the stat of Anne the security given is void and yet the contract is good. ~~(2)~~

~~[illegible]~~ A 2^d where part of the consideration of a security is bad, the whole security is bad, yet the contract ~~continues~~ is binding as to the sound part.
2 [illegible]

~~—~~ Contracts that go to the [illegible] [illegible] of the peerage or third persons are void; [illegible] [illegible] whether a [illegible] [illegible] was [illegible].

So also contracts [illegible] tend to the [illegible] of testimony, ~~[illegible]~~ [illegible] or [illegible] right. Cowper [illegible]

When there is an unlawful condition, as where a person conveys land to another on condition that he will do an unlawful act, the land passes tho' the condition is void.

[illegible]

(1)

Usurious Contracts.

[illegible] statute [illegible] [illegible] [illegible]

(1) It is said that when bonds are given with a condition to do an unlawful thing, the bond is good but the condition is void. Yet there thinks that bonds that are so considered destroy the principle; for he supposes a bond with a condition to be no more than a covenant detailed at length, which under the above circumstances would undoubtedly be void. Plow 32: 1 Salk 172.

If the condition is ~~written~~ underwritten or endorsed, then that is only void, the obligation is single; but when the condition is part of the bien itself, & incorporated therewith, if the condition be impossible, the obligation is void. 1 Salk 172. See Pl Plowd. —

(2) But in order to avoid a security it must be shewn that the agreement was in its creation illegal & usurious; it will not be usurious, if more than legal interest is afterwards paid, if not originally agreed for, or if not for the forbearance or payment. Bennet 940. 4 Wh. & S. 157. 6 Ct. R.

If a contract be for only five per cent, & the lender afterwards takes more, he is liable to be prosecuted for usury, & to pay the penalty, though it does not avoid the contract. 1 Wr Nat 100.)

(1) As if A sells a note ~~to B~~ given by C — and C afterwards gives B a new note, the first being founded in usury, B not informing B of the first being usury at the time he gave the second; in this Case the second is good, tho' the original contract was usurious.

(2) ~~Thorn~~ This question, however has never been decided, but from analogy it may be proved; for in the case of an infant who gives bonds for necessities, the bond is void, but the contract is good. So if a bond is obtained by duress from a person who is justly indebted, the bond is void, but it does not avoid the original ~~contract~~.

It is always lawful to pay the interest of the Country in which the bargain is made. From this rule the following question has arisen. Viz. Whether a bond given in N.Y. at their interest, and renewed in Con at N.Y. interest, is usurious? It has been decided in Con that it ~~is not~~ was not.

When a person passed the N.Y. line for the express purpose of receiving 7 per Cent, it was decided in Con to be usury.

(3) It is immaterial how many notes are given for usurious contract if for the principal ~~thereof~~ principal the whole.

When

Of Cases where the established Interest may be taken only

When upon the established interest is allowed only

. But when the principal is at all events to be repaid it is usurious.

Instead of these statutes, such as are allowed to lending money, and the interest of the principal depends upon a life.

But there must in fact be a hazard to some reasonable proportion to the demand of extra interest; for if the hazard is very considerable it will still be held usurious. When a man borrowed money at a high interest, conditioned that the bond should be void provided he lived one year from the date, and died at the end of eight years.

Compensations are usurious to some purpose, they are not paid by specified sums, they are not usurious usurious. This is the case of a contract entered into when the parties can provide by fulfilment.

But if there was a second agreement not to pay at the time specified for the principal

Made when the compact entered

If it not material as to the question of usury whether the money paid was delivered at the time of contracting or afterwards.

The obligee would mean that the contract is of a usurious nature, that the obligee; still binding.

or ~~illegal~~ (1) one

If the obligee ~~[illegible]~~ not what

(8)

made from time

may be had upon the trac (2)

Contracts of Equity are ~~[illegible]~~

~~[illegible]~~ only when the money found to be repaid.

~~[illegible]~~ interest

~~legal illegal. So in this case but in some measure vindictively. (3)~~

[illegible]

[illegible] But a contract of this nature relative to the compensation [illegible]

If [illegible] contracts [illegible] in a foreign country [illegible] the [illegible] interest [illegible] is [illegible] provided it is not usurious.

If the debtor of such a debt as that interest could not be [illegible], yet if the other contracting [illegible] interest it is not usury.

[illegible]

[illegible] Payments [illegible] are [illegible] first [illegible] interest, and then [illegible] the principal. This is the method pursued by the federal Court.

[illegible]

[illegible] time [illegible] action [illegible] may be [illegible] brought.

[illegible]

Of Considerations

Contracts have been [illegible] upon [illegible] before a sufficient consideration [illegible] [illegible]. [illegible] it will appear that a consideration is necessary to the validity of [illegible] contracts. 2 Bl Co 442.

A consideration is defined to be the material cause of the contract, or that for expressed the parties have been agreed. 1 Bl Co 330. 2 Bl Co 443, 444. There are two kinds of considerations [illegible] Legal & valuable. [illegible]

A good consideration is [illegible] [illegible] or natural affection between near relations. A valuable Consideration is

See page 340. the same thing respected

(1) Various other considerations may be made the foundation of a contract or agreement, according to the disposition objects & those who contract have in view: Therefore if an agreement be made to save the honor of a family, a court of equity, willing to lay hold of any just ground to uphold it, will consider the establishment of the peace of the family as a good consideration. 1 Po Co 362

Lord Mansfield said, that in Ch., the compromise of a doubtful right was a sufficient consideration for, & foundation of an agreement. ~~Po. 364~~

It was held by L.d Hardwick ~~[illegible]~~ in Lord Maltimore case, that the settling of boundaries & peace & quiet was a sufficient consideration. And it was also said that it was not necessary that the consideration should be expressed, for it was sufficient if it could be gathered from the contract. 1 Po Co 368

It is said that, if a man bargain & sell his land by deed indented & inrolled without expressing any consideration, the bargainee in pleading will not be obliged to aver payment of money, because it is necessarily implied; and a distinction is there taken between cases when any other consideration than money, & when no consideration whatever is expressed. 1 Po Co 368 Sed Quere.

If a promissory note has been negotiated, it is not necessary for the ~~ob~~ indorsee to prove a consideration altho' none is expressed, because the stat places promissory notes upon the same footing as inland bills of Exchange.

Mark Lord.

If an express consideration appear upon the face of a contract or agreement, the better opinion seems to be, that, if it be sufficient to support the contract, no other can be implied. 1 Po Co 368

(1) A grant, conveyance or other contract founded on a good consideration is usually void as against Creditors & bona fide purchasers, i.e. it is evidence of fraud, ~~but~~ but this presumption of fraud can be rebutted. Contracts founded on a good consideration are valid, in law, against Creditors & bona fide purchasers when executed, in ~~law~~.

~~(2) Drawing, or to maintain~~

Such as are made colourably by persons in ~~something valuable~~ of strong grounds, Cases in Chancery ~~(2)~~
9 Co. 25. 3 Co. 83. 1 Co. 361.

Sufficient good Consideration when executed is as between the parties. 2 Co. 297. 4 Co. 83. 1 Co. 361.

But in general these are not good as against third persons; but are deemed fraudulent & void. As in the case of creditors or purchasers.

~~Thus no other than a good consideration appears to prevailing presumption, and even if this presumption can be rebutted the conveyance is good, even against creditors. But it is deemed so strong as in most instances to prevail.~~

The facts in most of the cases in which are executory contracts depending on a good consideration have been enforced in Law; but Chancery have allowed them. 1 Vern. 427. 2 Ch. Ca. 196. 1 Co. 59.

Contracts depending on valuable consideration may be made in one of these four ways.

1. By stipulations, or, as we have phrased it, do ut des, or I will give that you may give; or I will give in consideration that you will give me. By this kind are all sales of goods, leases, & merchandise, when it is known or obligations are given in exchange.

2. Facta pro facto — or I will do, that you may do; or I will do for you in consideration that you will do for me. Thus I will go to Chelsea for you in consideration that you will go to Westminster for me. It is may be for forbearance: or for mutual forbearance.

3. Facio ut des — Or I engage to do in consideration of your giving me a reward. Land of this species is the contract between Master & Servant.

4. Do ut facias — I will give or engage to pay in consideration that you will engage to do my service. Of this kind is the agreement of the Master to pay provided the servant will serve. 2 Co. 395. 6.

All contracts are by one or the other of these forms.

Contracts are likewise divided into two general divisions. 1st Special Contracts or

Contracts by Specialty & Simple Contracts.

§ 1 Special Contract is one to be evidenced by a Specialty or Deed. and by Common Law no other than these are Special Contracts. Co Lit 171 – 7 Bl Co 460 – 295.

§ 2 A Simple contract is either one by parole, or written & not sealed. In point of solemnity there is no difference between contracts which are written & unsealed, & those which are merely verbal. 7 Co 351. 2 Bl Co 446 – b.

The distinction between Special & Simple Contracts is different in Scotland from what it is in England. All written contracts unsealed as well as sealed are here considered specialties. and only verbal contracts are considered as simple. From this it follows that the Common Law rules respecting Specialties extend to all written contracts, and that the rules appertaining to Simple Contracts extend only to verbal ones.

No verbal contract is binding without a consideration. They are then called Nudum Pactum, or naked contracts, & they are neither binding in Law or Equity.

A gratuitous offer is not a contract, wanting a consideration, an indispensable requisite to Validity. 2 Bl Co 443 – Sh 129 – Plowd 302 – 309 – 2d Ray 909 – 2 Co 145 – 1 Ryan 324 – 332.

Nor is a written contract binding without a consideration. 3 Bac 1070 – 2 Bl Co 446.

But this must be understood to relate to the Civil Law only; all written contracts, as before observed, being deemed in Common Law Specialties.

Blackstone & Wilmot say otherwise. Blackstone says, that in support of his position, Mansfield says, that it is binding, ~~in support of his position~~ even tho' there is no consideration. But it should be remembered that even in this case, as between the original parties, the consideration is supposed to exist, & the Law presumes the consideration & awards it. Wilmot is that after it has been negotiated, the consideration ~~before the endorsee sues~~ cannot

If this rule is founded upon the fact which makes promissory notes negotiable, for that reason it declares that they shall stand upon the same footing with ~~Bills~~ Inland Bills of Exchange. The Statute of New York which is a transcript of the big Statute upon the subject.

be gone into, the promisee cannot plead a want of consideration. (1) ~~It has been so proceeded upon a rule of Equitable policy.~~ Co Lit 34 - Dyer 314 7 Ze 121 - 351 - 4 Mod 242: Ryd 151: 2 Ze 221. 3 Atk 321: 2 Ze 91: 1 Ford 335.

Even in Specialties in principle a consideration is necessary to its validity. But here the Plff need not prove a consideration. Nor can the obligor prove that there is no consideration. But there are thousands of instances where bonds are decreed to be void without any consideration. But still in judgment of law there always is a consideration. The solemnity of the instrument importing one. ~~If it were not so that in judgment of law there is a consideration, the opinion of Cowper seems to be incorrect.~~

The Deft will not be permitted to prove a want of consideration, for that would be a disavowal of his solemn act. P Co 232 - Plowd 308 - 3 Bul 97 1 Ford 334: 2 Bl Co 1246 - Hard 200: 2 Bl Co 29: Plowd 434: 17 H 344: 2 Ray 729 ~~[illegible]~~ 1 Sa 155.

What if a Specialty shews on the face of it a want of consideration? He thinks it could then be avoided. 2 Ze 577: 3 H 538: 7 H 477.

The want of consideration in Specialties can be proved by instruments of as high a nature making a part of the contract.

Powell says that in a voluntary covenant, tho' under seal, only nominal damages can be recovered in law. This seems to be pty that the consideration may be gone into, & that such obligations are good or void.

Mr J. thinks the meaning of the rule seems to be this, that this inquiry may be allowed in ascertaining the damages, tho not till after the declaration is proved. Whether is the construction it is consistent with the rule, otherwise not. Co Co 34 - 2.

The consideration mentioned in a deed of land is proof as to there being a consideration but not as to the amount. ~~in Dr Committee~~

A sufficient consideration to support a contract may arise either of these two ways. 1 from something which is advantageous to the party promising, or disadvantageous to the party to whom the promise is made.

The first sort of consideration is immaterial in law, they will not then inquire into it. However great inequality of consideration combined with other circumstances, ~~too~~ will tend much to raise a presumption of fraud; but the smallness of the value will not be sufficient. 1 Will 250: 2 Vesy 518: 2 Ver 69.

Idle & indefinite considerations are deemed no considerations at all & will not support a contract. As in consideration that you will wash your hands I will do so & so. As in consideration of a bear or wife.

But almost any act to be done by the person to whose favour the promise is made, is sufficient to support the contract, if it is in favour of the promisor. Co Lt 99: 150: Co Lt 70: Dyer 272.

Also it has been holden that the mere relation of landlord & tenant is sufficient consideration to support a promise made by the tenant to his landlord. 5 Ju 373.

All inconsiderate considerations arising from some disadvantage to the person to whose favour the promise is made. As if a person [illegible] B & A promises to deliver it up provided B will satisfy him, this is a sufficient consideration to support B's promise. Cro Ja 5: Co Ja 342. Co Ch 74: 2 Co 849. 881: Comyn 178: Hob 216.

It is a general rule that a contract cannot be supported by a consideration already executed & past. As if A should discharge his debtor B from a debt, and B should sometime after in consideration thereof make a promise. (1) 1 Lord 5: 202. Co Ch 1142 2 Mod 73 1 Sp 50 Dyer 272. Co Ch 94 — Co Ch 149 1 Ro Co 346 & 350 — 1 Roll R. 114 — 3 Ch Rep 210 1 Ch 138 1 Ro Co 350

If there is a previous moral obligation existing which is the moving cause of the contract, that is sufficient to

(1) But if part of the consideration be past & executed, & part remaining, such consideration will be good. As when a lessee in consideration the lessee had occupied his land & paid him punctually, promises to defend & continue him in possession in future.

A Contract upon a consideration past, is good, if there was a previous legal obligation on the part of the promisor. As when one promises something to another in consequence of past indebtedness. So also where one promises another, upon consideration that he paid the funeral charges of his child.

(1) As if one should promise to pay a Debt barred by the Stat of limitations.

(2) As if A should request B to bail her servant.

(3) If an infant was sued for Velvets & laces furnished him, and a friend of his promises that in consideration of his being discharged from the action, he will pay the money; no ~~action~~ suit can be maintained upon this promise, for there was no colorable ground for the action against the infant. Latch 142. Dyer 272.

(4) If a man is under a moral obligation to do a thing & another does it for him, tho' without his request, & the person benefitted afterwards promises to pay in consideration of the favor, he is bound. Bull N P 147.

Support of the thing is the legal obligation. (1)
Comyn 290 7 Mag 289 - 2 Bl Co 446 - 1 Hunt 335 Hyp 5

If consideration paid & received with support an obligation, provided it accrue as the reputed of the promisor. (2) Hut 260 - 3 Sh 90 - 1 Salk 120 Hob 132. 5 Ph 10 Co R 42 - 282 Sep 95 (4)

If there be a mutual and concurrent expression made by them the consideration thereof. If a promise B will release her from an action of trespass
Cannot sp. in an action for the promise.
with respect to an obligation to C. Hob 245 Ve 5 Ve 1 Hutt 6 Bridg & Bulle 1082 - 8 Mod 113 Comyn 290 - 3 Co R 3 & 6. 5 Bac 260 - 261 4 Bum 115 - 3 Burr 1560 1 Hutt 6.

But a mutual promise will support a promise to a near relation, at least between husband & wife, & when A promised B that if he would give his daughter, he would give ~~[illegible]~~ an obligation to his son. Hut 318 - 332 Sep 95.

When the performance of a deed is the consideration two requisites are necessary. 1st Then the performance is either general that is total, or for a specific time. 1 Po Co 353 - Co R 206. And 2d. It must be of the nature for which the party has a valuable right to recover against the party said. ~~to be well in [illegible] [illegible]~~. Sep 95 - Hut 73 - 3 Sh 90.

If a promise is made in consideration of the ~~[illegible]~~ forbearance of a suit, without specifying any time, the promise is not binding, ~~for the party ought to~~ not wait after commencement ~~of a suit~~ if ~~it~~ the consideration is at all.

But a forbearance for a reasonable time is a good consideration. 1 Com 284 Co R 19 - 435 Sep 95 Hut 108.

If a person who is arrested on a void process in consideration that the prosecutor in the action makes a promise in consideration of being released, it will not hold, unless the consideration be valuable. Sep 95 Com 284 - 16 Hard 73.

But if there is a valuable ground of action it is then a good consideration. (5) ~~The [illegible]~~

~~Action upon simple promise in full proof of defence in ~~ ~~the plaintiff's claim~~ ~~They would of course have stay thereon.~~ ~~As in the case of an implied or express promise, being necessary, and his promise to discharge the debt is consideration of the same, a suit upon the claim lies by law.~~

Lord it is a general rule that when a promise is made to perform a legal duty, the creditor need not prove the note it arose. If there is merely a colourable ground of action it is sufficient. Hob 10

When that which is stipulated on the one side is the consideration of performance of what is stipulated on the other, the considerations are mutual, not the contracts as will be seen hereafter. 1 Ves 197-214 3 Atk 95: 7 Ves 30: 1 Bl H 265. 277.

When the performance on each side is to be concurrent, or each is to be done at the same time, ~~the opposite~~ neither party can sue without performance, till he has ~~done~~ performed his engagement or offered to perform it. Atk 171-112-113 Doug 609-605 n 600. 2 Ves 381: 1 Hen Bl 303. 7 Ves 175.

If one promises to pay another for doing a service he must first pay, tell the service has been performed, ~~his engagement~~ until the day of payment fixed upon is before the act was to be actually performed. 1 Co 100 1 Ves 197 Atk 171. 2 Ves 42 2 Doug 605 n 609-71.

But if the day of payment is after the act was to be done the debtor must show the performance of it ~~before he can recover~~. Atk 171: 3 Ves 95: 10 Ves 356 ~~Cowp~~ Doug 76: 1 Bos & Pul 1147.

When one person promises to consider a promise by the opposite party, the fulfilment of the promise is such a consideration ~~therefore~~ precedent to the ~~stipulating~~ of an action by either party. Either party may sue without proving the fulfilment on his part. 1 Ves 197-214: 1 Lev 295 Atk 20: 2 Ves 211.

There is one form of promise upon which contracts are not equal. If A promises to B to pay B so much money to Jackson

(1) ~~If they are not both binding there is a waiver of condition.~~

(2) See a note to the last edition of Saunders in a note for a full exposition of the law relating to conditions precedent, concurrent, & subsequent.

he transferring stock to me. Yet [illegible] thinks no such mutual promises, but depend upon the fulfilment of B's engagement, it being necessary to the [illegible] of me that he should transfer his stock. Then it must be averred in the declaration, either that he has performed or has offered to fulfil his engagement. Salk 112 Holt 661: 2 Bl R 1312: 12 Mod 516. 1 Com 382: Bury 665: 1 Ld 645. 6 Mod 30: 7 Mod 20.

Where the mutual promises are the consideration of each other, each party may maintain an action without alleging performance. ~~[illegible]~~ Bury 665. Comyn 65 2 Bl R 1312: 1 Lev 65: 3 Keb 41 – 1 Mod 282

Courts will not declare contracts to be void as to performance, ~~[illegible]~~ without a performance, if they can avoid it, it being much against ~~[illegible]~~ Salk 761. (2)

Mutual promises must be the binding on both; they must be left made at the same time Hob 88. Salk 211

The mere taking of property to do something thereupon is a sufficient consideration to compel the performance thereof. 2 Roll Abr 469 2 Lev 43 Comyn 133 Salk 26.

Which has also been holden that a contract has in view the maintaining of the peace of a [illegible] 1 Salk 2.

The compromise of a doubtful claim is also sufficient to support a promise. 1 Salk 152 1 Ven 15: 2 Strat 933 2 Ld Raym 1204: 1 Com 368.

If the implied consideration appear, it is sufficient. Plowd 450.

Even if there is no express or implied consideration, law will not presume ~~[illegible]~~ 1 Co 24.

It is a general rule in law that parol in the consideration of a contract does not vitiate it, but in the consideration it does, for a deed is conclusive against every contract, and therefore in the consideration of a deed that the place is immaterial the deed is void.

2 Wm Ch. 2 Swift 422. 2 Ch. Ca. 29. 11 Ch. 29.

Until Chancery will relieve against contracts when the parties are in equal condition, positively the parties in the same situation as they were before the contract was made. This decision proves the point.

But even at Comn Law the party already received or damages respecting the person of the party.

If the party does not choose to prosecute the Comn Law remedy he may file a bill in Chancery, [illegible] an injunction against a suit upon the contract.

Courts

[illegible] to relieve it up when [illegible] recommended. 2 Wms. Chancery 2 Ch. Ca. 195. Where the total failure has been held sufficient [illegible] a contract.

Courts

When Chancery relieves they [illegible] the parties

religious

[illegible] passing back the total consideration.

Of Contracts to Work
Must be in Writing.

In addition to the foregoing distinctions [illegible] contracts, there are [illegible] 1 By the Stat of Frauds & Perjuries. [illegible] the terms of any [illegible] contract.

notice

[illegible] contract may require [illegible] in writing [illegible] Comn Law.

[illegible] the [illegible]

[illegible] 2 Ch. 17. 2 Wms 189. 1 Ch. 189. 12)

As far as [illegible]

[illegible]

Cancellation

By this Stat. the following affairs [illegible] a bond in [illegible] Comn Law [illegible] they [illegible] in contracts, signed either by the party [illegible] or some other person legally authorized by them [illegible]

Can

[illegible] 1st [illegible] 97

(1) was such that the contract would not have been entered into if it was known.

(2) This statute is entirely adopted in the State of New York.

~~(1) The statute of frauds & perjuries of this state contains the same.~~

~~(2) 6 Geo 4 c 16 s 17 enacts that the sale of any goods wares & merchandize ~~[illegible]~~ above the value of ten pounds, are not of any effect unless there is some note or memorandum in writing signed by the parties to be bound thereby, or by some person authorized by them, or unless part of the goods are delivered, or there is earnest money paid.~~

(3) The award ~~[illegible]~~ that an administrator shall pay is binding upon him at all events. The submission to arbitration by an administrator is a reference not only of the cause of action, but all of another question, viz - whether or no the administrator has assets. And when the Arbitrators determine that the administrator shall pay the amount of the Plaintiffs demand, it is equivalent to determining as between these parties that the administrator has assets to pay this debt. 7 Ter 453

(1) 5 Eng C L R. There is another clause which says that no contract for the sale of goods wares & merchandize ~~[illegible]~~ of the value of ten pounds &c. ~~that~~ C L R.

(1) Under this clause it was decided that earnest binds the bargain for P. Hotz: but in a case in 2 & 2 it was decided ~~that it~~ binds the prospect (Latk 113.)

(1) By stat Geo 2: the landlord may have an action of indebitatus assumpsit on parol leases. At com law it would not lie for rent. (Lep 20.)

[illegible]

[illegible]

[illegible]

[illegible]

Original promise said not to be in writing, but pleaded [illegible] Rule [illegible] [illegible] Bro. [illegible] Precedents are contemplated by the Stat of frauds & perjuries, and therefore must be in writing. 5 Ray 1007. Comyns 227. 1 Salk 27. Dig. 101. 2.

Lep Digest 101. 2.

[illegible] a collateral promise, but [illegible] what is then Stat is may be supposed. 1st That a promise made for a third person is that the third person is not at all liable to the promisee, is a original promise. 2nd When an undertaking a promise the third persons liability is extinguished it is a original promise. These two rules will include all original promises. (1) When a promise which is made for behalf of a third person, is [illegible] a existing liability on the part of the third person, is a [illegible] a collateral promise. 2 Mass 218. 2 [illegible] 4.

06. Salk 27. Dig. 101. 2. 2 L. Ray 1085. 6 Ga. 90. 1 Bin. 1001. 3 Bin. 65.

If a person tell a Merchant to deliver goods to [illegible] & charge them to him, it is an original promise & need not be in writing.

If a person tell a Merchant to deliver goods to another, it is an original promise. [illegible] 2 Ga. 81. 1 Salk 210. 5 Ray 1085.

But if the application is [illegible] to deliver goods to [illegible] that I will pay for them in case the other fail to pay, it is a collateral promise & must be in writing. [illegible] is only a security for the other. [illegible] Comyns 227. 1 Salk 29. Dig. 102. 5 Ray. 1080.

[illegible] The [illegible] position is [illegible] determining the question, [illegible] about having been completed [illegible]

(1) When an existing lien is destroyed the promise which created it is good without writing: tho' it may be questioned whether this is an original promise. But ~~these~~ promises in case of this sort are not strictly to pay Debts of another, but are confined to promises made in cases of Assault & Battery or where there is no existing Demand

~~Promises made for a third person and which do not obligate that person; and~~

(2) Promises which are made in consideration of extinguishing a third persons liability: and promises made where no liability existed on the part of a third person, and for his benefit, ~~where~~ but which are not binding upon him, are <u>original promises</u>.

But promises which are incurred with the <u>liability</u> of a third person are <u>collateral</u> promises. 5 Mod 205 2 Will 94: 1 H 306: Salk 27: Osp on Sep 101.2: 2 Ld Ray 1085. 617: 2 Ver 80: 1 Esp. N.P. 120: 3 Bur 1896.

with bread that he would see him paid. This was determined to be a collateral promise. 2 Ld. Ray. 91. 1 Salk 28. [illegible] "I will see you paid" [illegible] made the following [illegible] That if the goods were delivered before [illegible] promise, it was an original one. But this distinction has been overruled. Comp 228. 9.

A promise made to a Merchant to furnish goods, [illegible] the Merchant answered that he knew no such person; upon which the person replied "If you know one I will see you paid". This was decided to be a collateral promise. Cop 101. 2. 2 Ld. Ray. 91.

A promise made to the owner of a horse that if he will deliver him to a jockey for me, is a collateral promise. Salk 27. 5 Bing 1085. Ellis v. Ellis. 6 Mod 26. 3 Salk 18.

And it is a general rule that a promise by one person, that another shall do, and in case he does not, the promisor will be responsible, is a collateral promise. 5 Bin 1085.

A promise made in consideration that the promisee will extinguish a debt against a third person is an original promise. 3 Bos 1080. Williams v. Vaughan. Pay. — If a tenant makes over his goods to a creditor, and upon the landlord's making distress, the creditor promises to pay the rent upon condition that he will release the goods, it is an original promise, [illegible] 3 Bos. 1806

A promise to pay a sum of money upon condition that the Plff will forbear an assault & battery, and not commence a suit, is an original promise. For in this a release disables the party from bringing another action on the same promise. 1 Wils 296 1 Wils 305. Ho. 209. [illegible] duty certain.

A promise to pay a creditor for staying a suit brought for a debt against J. S. is a collateral promise, for the promise is only in aid of that liability. 2 Will 94. 3 Bos 1099. 1 Ld. 901. 2 Wils 32.

If a promise has been made in consideration of a creditor withdrawing a suit, it would probably be considered as an original promise, for in this the withdrawing of a suit bars the party from ever suing again upon that cause. 3 Wils. 296. notwithstanding Cro. 238.

The law in words would probably be considered as a collateral promise, a retainer not being a lien in this state to another.

A promise is made to pay another debt, if the plff will release, hence, pending a suit on mutual promises, ~~such a promise would be~~ collateral. A promise to satisfy the debt upon the plff's release, is an original promise, for the voluntary release of a final judgement, releases the debt. 4 Bur 2082, Cro Eliz. 6 Ve 525. 9 Ve 42

It has been determined in Cont, that a promise to satisfy upon condition that he will release the thief, a collateral promise. For this savours of the offence of compounding a felony.

It has been holden by some of the judges that when a new consideration arises on a promise to answer for the debt, default, or miscarriage of another, that it is an original promise. But this is contrary to the spirit of the Statute & to the decision in the 2 Wills 94. If this were the case the stat might always be evaded, because a new consideration always arises. 3 Bur 1887. (1)

It has been decided in Cont that a written promise to pay the debt of another provided the debtor does not, is discharged by the promisee standing forbearance to the original debtor, because a forbearance to assess the debtor upon himself. Cowp 329. Contracts are good in toto or not at all. They cannot be severed. 7 Ve 214.

~~(2) When, according to the consideration of the contract the promise must be written, it is not necessary to aver or an action brought to rely on the promise, altho it is necessary that the written promise be produced upon the trial. 1 Mod 140. 1 Ley 45. 3 Bur 1669. is that case. Quere.~~

~~Whether such a contract as must be written to be pleaded in bar to prevent the debtor bringing for the same cause, must be proved to be in writing, because by pleading in bar it is always a settled thing that there was once a sufficient cause of action? This cannot be the case, for pleadings cannot take away a right of action which the proofs were to prove settled, without showing the same satisfied, by the right was taken away. Hob 87. Ld Raym.~~

~~It appears to the that~~ Contracts made in consideration of marriage must be in writing, ~~to be binding. This act however~~ does not relate to promises to marry, for they are good by parol. But 1 Ves. 1 Vent 173 1 Ch 318. Ch 321. 1 Ves 269.

(1) ~~Hence~~ It cannot be law that a new consideration will take a case out of the Statute, for a promise without a consideration would not be good at Com Law; and the Stat: certainly intended some alteration of the Common Law. —)

(2) The Rule is universal that when a contract was good at Com Law without being in writing the Stat requires it to be in writing, that it need not be averred to be in writing; for ~~[illegible]~~ such laws are not considered as intending any alteration in the rules of pleading. 12 Mod 540: 7 Ray 450. 9 Ben 1060: 4 Ben 655: Bul 279.

Bul NP 280.
1 Saund 179.
1 Salk 618.
Ow Rep 526.
1 Ow Ca 277 &c.

(1) In Sapsworth's reports there is a case in which it has been decided, that the accepting of an order for goods is a sufficient entry or memorandum to bind the parties.)

It is the ~~above~~ rule that ~~that~~ contracts made in consideration of marriage must be in writing, there is but one exception, ~~they~~ that is in the case of past performance.

It was formerly ~~supposed that the~~ parol agreement ~~made~~ in consideration of marriage would not bind the parties, provided it was stipulated that it ~~the agreement~~ should be put in writing. 1 Ch Ca 135. But it ~~if~~ now ~~stipulated that~~ decided that ~~either it be stipulated that the agreement shall be~~ it is not binding ~~writing, yet it is not sufficient to bind the parties~~ 1 Vern Ca 81. 2nd Ves Ch 402. 3 Atk 504. ~~The following rule probably applies to all the clauses of the~~

~~It has been determined that~~ a letter signed by one of the parties ~~and~~ received by the other is a sufficient ~~writing or memorandum~~ to make such an agreement binding. 1 Atk 179. 2 Bro Ch 32. 5 Ves 318. 1 Vern 211. 2 Atk 392. (1)

But to make a letter binding it must appear that the opposite party accepted the terms stipulated in it, & in proceeding to ~~putting into~~ execution of those terms because there must be an assent by both parties to make any contract binding. 2 Atk 65. 4 Mod 3 Ch 5 66. 1 Vern 179. The letter must be definite as to the terms. 1 Atk 216. with 12. 1 Vern 179 & 1 Ch 5 66.

~~The Statute provides that no agreement made for the sale of lands, tenements or hereditaments, or any interest in or concerning them, shall be binding.~~

~~It has been argued that~~ ~~In this case also it was doubted whether the an~~ agreement was a parol, and it was ~~also~~ specified that it should be in writing, ~~but it differs~~ but it would not be binding. But it is now settled that it would not. 9 Ves 151. 159: 1 Ch Ca 46: 1 Atkyns 16: 1 Atkyns. 12 Ves 221. 2nd Ves Ch 402. 2 Ch Ca 5 05. 6 Ves Ch 45.

~~But in the above clauses in the statute are~~ ~~many exceptions.~~ There are many cases in which parol agreements are ~~binding~~ for and are binding.

The Stat provides that no parol agreement either for land or any interest concerning any land, tenements or hereditaments is binding. ~~But if~~ ~~and~~ parol agreement ~~for land~~ can consistently with the Stat and common law rules of evidence be proved it is binding. This exception establishes the principle that the object of the St is to introduce a new rule of evidence. If a bill filed to ~~be~~ on a parol agreement for the above purpose the Defendant ~~by answer~~ ~~should~~ confess the agreement ~~provided he did not insist upon that defence in his answer~~ it would be enforced. 1 Atkyns 221. 441. 2nd Ch 208. 221. 2 Atk 100. 152. 1 Atk 159 & 160. 1 Ante 506. 5 Atk 5. 2 Ves Ch 568. The rule applies to the other clauses of the statute. The act proved must be of such a nature as not to endanger perjury; otherwise it would oppose the object of the Stat.

~~For this reason~~ Lord Powell ~~gives~~ gives the following reason. ~~for~~ The contract being confessed in the Defts answer, which ~~answer~~ is in writing ~~therefore such a confession~~ makes the contract a written one. But this reason is against ye priviledges. 1 Ven 292.

It has however been doubted whether ~~altho~~ the Deft ~~confessing the~~ is bound by his confession of his agreement in his answer, even ~~the agreement shall be enforced~~ provided he insists upon the benefit of the statute of frauds in bar of the plaintiffs ~~upon the pleadings~~ 1 Ver 268. 374. But it is ~~laid down by~~ L.d Hardwick ~~and is so reported~~ in 3 Atk 3. ~~Accordingly~~ ~~determined~~ in 2 Atk 155 that if the Deft confesses the parol agreement he shall be bound by it. ~~altho parol~~. It is also so laid down by L.d ~~Hardwick~~ Mansfield in 1 Wilk Ap Co. 2 Wm 61 568. It has however been determined in a Court of Law, that altho the Deft acknowledges the agreement, yet if he insists & relies upon the St, he shall not be bound by the agreement. 2 Wm 63. But this ~~is the only~~ authority ~~on that side of the question~~ is ~~that~~ only quoted by the Judge & not yet ~~in the right & business~~ 2 Wms 564 ~~The authorities on the other side for convenience this one,~~ ~~as the rules of Ch agree with those of Law with respect to the admission of the confession of the parties, it clearly follows that the confession of the parties Defts~~ ~~agreement obliges them to perform~~. 2 Wm Ch 564.

It has been made a question whether in a Bill in Chy for a specific performance the Deft is bound to confess or deny the agreement? It was decided by L.d Macclesfield that he was bound to. 2 Wm Ch 566. 1 Ven 160. 170. L.d Thurlow is of the same opinion. ~~Lord Thurlow~~ ~~in Proctor the Defendant promised~~ 1 Wm Ch 567. L.d Loughborough is of a contrary opinion & so is Lord, for in not obliging the Deft to answer there is no danger of perjury; but if he is ~~pressed~~ compelled to answer a strong temptation is presented to ~~the Defendant for perjury~~ commit perjury. 2 Dl Pr 68. Besides if the question is decided that the Deft is not bound to testify it does not affect the former question, but if it is determined that he is bound to answer it certainly takes the former question out of the statute.

It is also holden in Eq that a ~~feeling to~~ confession of a parol agreement ~~for~~ the sale of lands ~~concerning the conveyance~~ ~~any interest therein shall be binding thereon~~, provided he has out of Court ~~confessed the agreement which the confession~~ may be proved by parol. The decision Lords apprehend to be contrary to all principle,

For by it villany, fraud & perjury ~~in this case~~ might easily be introduced. 3 Atk 407. 1 Ves 293. ~~This last rule is said to be decided upon the same principle as the Dept confesses the agreement in Court.~~ The reason given for this is the danger that there for finding a party by his confession of a parol agreement in court. 3 Atk 407. 1 Ves 293.

A parol contract for the sale of lands, tenements or hereditaments, or any interest in them is binding when the sale is made by a master in Chancery at ~~Vendue, but~~ Auction by order of the Court; for full evidence is to be given to the records of any Court, or any act done by the Clerk or other officer, & witnessed by their official signature. 1 Vesey 218, 221. 1 Ch Ca 286. 1 Ch Ca 334

In the Eng Authorities it is held, that a parol contract for lands, tenements, or ~~hereditaments, or any interest in them~~ is binding, if the contract can be proved ~~implied from~~ by circumstantial facts, ~~in the proving of which no fraud or perjury is injurable, only~~ if B receives an absolute deed of B. & obligations are executed to the amount of the consideration, B remains in possession of the land, he pays the taxes, he does not account for the rents & profits & interest is paid on the obligations; - These facts are irreconcilable with the idea that this ~~contract meant to convey~~ an absolute ~~deed~~ title was passed. ~~There must have been a different parol agreement, which parol agreement ought to be proved by these facts.~~ ~~But the facts there proved must be probative facts.~~ Pa Abbot 65. 3 Wood 429. 2 Vesy 376. 3 Atk 71. Pa Ch 326. Talb Ca 60. 1 Vern 108. 1 PW 381. 2 PW 549.

The rule therefore presupposes the facts to be notorious. Therefore testimony cannot be admitted to show directly the fact of such a contract being made.

In Con it is objected to the rule as above laid down because there has been no judicial decision, and that all the authorities above cited are barely the Dicta of the Judges. But where there are no Judicial decisions, dicta so respectable sufficiently supplies the want. The Supreme Court has sufficiently established this rule in two instances; the first of their decisions was reversed by the Supreme Court of Errors. ~~There are other exceptions to this before mentioned, which are founded on the principle that a Statute made to suppress fraud ought not to receive such a construction.~~ That so far as it respects land not proved upon the

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to protect & encourage it. 1 Po Co 944.6.
1 Blk Rp 600. 1 Ford 171.2.

~~When a party by not performing a part of a contract for the sale of lands &c is about to practice a greater fraud than would result from performing it, the law will compel the performance.~~ If for instance in a parol agreement part of the contract has been performed, ~~at the request & assent of the other party~~ Ch. will deem a performance of the ~~part not performed~~ rest. 1 Ford 172. 1 Ven 159. 1 Blk R 600. 1 Vesy 221. Sh 383. 2 Atk 100. 2 Ven 373. 619. Hardy 399. 309. 1 Ford 403.5. 9 H 57. 1 Br Ch 417. 561.

Powell's reason for the above is that the part performed is notorious & sufficient proof of the agreement. 1 Po Co 96 97. If part is performed Ch. will enforce it altho the terms of the agreement are not precisely settled. 2 Eqn Cases Abr 48. 3 Ves 523.

A mere delivery of the possession of lands in pursuance of a parol agreement has been held sufficient to take it out of the Stat. 1 Ven 365. 455. Mountney 94. 2 Ch Ca 71

~~The~~ Taking possession in pursuance of a parol agreement is deemed sufficient to ~~hold~~ bind the land against a subsequent purchaser. 1 Ven 365. 2 H 263.

So the rule is that when the equity is equal the elder title prevails, and also that when the equities are equal priority prevails.

The payment of money by a purchaser under a parol agreement is such an act as will take it out of the Stat. 3 Atk 2. 1 Vesy 83. 222. 1 Ford 175. 575. 5 Ven 522. 1 Ven 304.5.

This rule was not settled till the time of L. Hardwicke & ~~was objected to on the ground of~~ the following decision. (viz) In a parol agreement the purchaser paid £100 as earnest & afterwards ~~to deliver the goods to the purchaser~~ land he brought an action to have the agreement specifically performed: but the Court determined that it was not sufficient to take the case out of the Stat. Po Co 461. 2 Ch Ca 46.

It has been questioned whether the receipt of money in part payment of a parol agreement, can be proved by parol. But unless it may, the rule that a parol agreement under these circumstances is binding, is nugatory, because the contract would not rest on parol proof, but on ~~evidence by~~ written testimony. 1 Po Co 4. 1 Po Co 307.

Powell says the receipt of money in part

Text continues

Payment can be ~~altered~~ established by parole proof, & gives the following reason (viz) The payment of money is an independent collateral fact.

If there is a part performance on one side of a parole agreement, the heirs of the opposite party are as liable to have the performance decreed against them, as was the principle. 1 Ves Jr 300. 3. 1 Atk 2. 7 Ves 300.

In all cases the acts claimed to have been done in part performance of a parole agreement must be such, as would not have been done, had it not been for the agreement. 1 Ves Jr 309. 1 Bac 74. 3 Atk 4. Pr Ch 561. 1 Bro Ch 412. 1 Atk 12. 6 Bro Par Ca 45.

* If on a parole agreement the parties should order a conveyance to be made out, & even board for that purpose, the trouble they take is not a part performance, but merely introductory to the agreement. 1 Ves Jr 309. 1 Bac 74. 3 Atk 4. Pr Ch 561. 1 Bro Ch 412. 1 Atk 12. 6 Bro Pl Ca 45.

In parole contracts made in contemplation of marriage, the marriage itself as between the parties is not such a part performance as will take the agreement out of the Stat; for in parole agreements made in contemplation of marriage, the agreement is to take effect only on the condition of marriage; if therefore marriage were considered as a part performance, it would take every case out of the Stat. 1 Bac 74. 1 Pr Ch 561. Sty 338.

But a parole agreement made in consideration of marriage by a third person, as a father in favour of a daughter will be taken out of the Stat by a marriage, provided the marriage is had by the consent of the third person. 2 Ver 373. 2 Freemans 261. 1 Ves 298. 299.

* When the wife was allowed by her husband to take the interest of a legacy given, which the husband had agreed by parole upon marriage to settle to ~~the~~ her sole & separate use ~~of the wife, such taking of interest~~ it was holden to be a sufficient part performance to take the agreement out of the Statute. 1 Vesey 297.

~~Land~~ Getting tenants upon land, which by parole agreement was to be settled on the wife by way of marriage settlement, in pursuance of such agreement, was held a sufficient part performance to take the case out of the St. 2 Eq Ca Ab 29.

It has been lately determined by the Court of Errors in Con., that a part performance of a parol agreement does not take it out of the Statute. ~~It was indeed held by~~ The Supreme Court (formerly) held (previously) that a complete performance of a parol agreement does take it out of the Stat. Kirby 399. The Court of Errors proceeded upon the ground that a parol contract of this nature was void, and that no fulfilment ~~can~~ (cannot) make a void contract good, ~~or when it is void from the beginning~~. But the Spirit of this rule is only to regulate proofs not the contract itself.

~~Upon the principle of preventing fraud~~, A written agreement respecting ~~an interest in~~ lands may be contradicted by ~~proving the original~~ parol testimony ~~agreement~~ provided there was fraud in executing it. ~~The written agreement~~. This rule applies to all ~~applies to all~~ the branches of the Stat equally. E.g. ~~suppose~~ A by parol agrees to execute a deed to B, B at the same time is to execute a defeasance, A executes the deed, but B refuses to execute the defeasance, ~~he~~ A may prove the parol agreement in order to detect the fraud of B. 3 Atk 369 a 88. 1 Ford 188. 1 Ch R 520. 2 Atk 203. 1 Eq Ca Ab 22 a. 1 Pr Co 294.

And the rule is the same if there is a mistake in the execution of the Deed. For it is immaterial whether there is a fraud or mistake. In the case of a fraud the minds of the parties do not meet, & in the case of a mistake neither party gives his assent to what the other stipulates. 1 Vesy 457. 2 Atk 203. 3 Atk 889. 2 Ves 376. 1 Pow 433. 1 Ford 188. 193.

~~The four last rules are law in Con as well as in Westminster.~~

A written agreement respecting an ~~agreement~~ interest in lands may be contradicted by a parol agreement for the purpose of rebutting an equitable ~~In equity means an equitable right, or which is recognized but not enforced by a Court of Equity. And to contest means to oppose it.~~ This rule is peculiar to Courts of Equity. 2 A & B enter into an executory agreement in writing, & by a parol agreement the written agreement is rescinded. On a bill filed in Eq by A to compel B to a specific performance of the written agreement, A may prove the parol agreement.

~~A court of law cannot compel a specific performance of an agreement. It decree of a specific performance is a mere equity; and to rebut this as well as other equities a parole promise is permitted to be introduced.~~ This parole agreement may be proved, not on the ground that it can destroy the written agreement, for this is directly opposed to the rule of evidence that no parole agreement can destroy a written one — but merely to instruct the Chancellor, & enable him to determine whether he ought to enforce it or not. 1 Ven 246. 1 Po 234. 2 Vern 299

By a St of Geo 2d it is provided that an action of Indebitatus Assumpsit lies in favour of the Lessor against the Lessee for the rents & profits upon a parole demise, and that the parole demise may be proved by any evidence. ~~The parole agreement is not opposed on the ground of proving a valid lease, but to shew what the Dep owes the Plff.~~ 2 Bll. Re. 1249: 1 Ves 378. 1 Will 314. Esp 20. 21. 165: 3 Ch. 327: 1 H Bl 255.

In law tho' a parole demise creates a mere tenancy at will, yet an Indebitatus Assumpsit will lie provided the possession was by consent of the Plff. But if the possession was by action this action will not lie. Esp 20. 21. 1 Ves 378.

5. Of Contracts not to be performed within a year.

~~Contracts not to be performed within a year after they are made,~~ are required by the Stat of frauds and perjuries to be in writing. ~~This rule however does not extend to an interest in lands or tenements; for all the provisions intended to be made about those contracts made in a former clause. But a sufficient reason why this rule should not extend to lands and tenements is, that it would be totally superfluous, for by a previous clause all these agreements are required to be in writing.~~ 1 Vern 159. 1 Ves 273 a 6.

~~Under this clause it is settled,~~ that a parole agreement ~~to be performed~~ upon some contingency which may or may not happen within a year — ~~the time of making is good.~~ is not within the writing.

~~But agreements upon a contingency which~~

~~May or may not happen within a year from the time of making, need not be in writing.~~ Salk 280. 280. Bullet 200. 1 Ves 244. 17: 3 Bro 1278. Jac 506. 3 Atk 1. (2) ~~Secondly contracts not within the provision of the statute are such as are made, the performance of which depends upon a contingency which may or may not happen within a year said,~~ It is not necessary that the contingency actually do happen within the year for nothing ex post facto can alter the nature of the contract, it is good or void ab initio. Ray 317.

This clause of the Stat Frauds extends only to those contracts which by the express terms of them are not to be performed within a year from the time of making them. 3 Bro 1281.

The construction of this as well as of all other Stats is the same in Eq as at law. Therefore the rules formerly laid down apply as well to Courts of Eq as of Law. (1) However the ~~relief~~ remedy ~~of the Stat~~ is usually different ~~at law than in Equity~~. 1 Salk R 600. 3 P. Co 430. 1: 1 Ves 22.

The Stat provides that "~~to make a contract of a certain description legible~~ there must be a note or memorandum ~~of it~~ in contract in writing". ~~The Stat does not contemplate~~ Any writing which is intended to furnish evidence of the contract or agreement is sufficient, as ~~A letter therefore, written by one party is a note or memorandum within the meaning of the Stat.~~ 2 Bro 62 32. 3 Pr 318. 1 Ven 201. 2 Pr 322. 1 Ves 179. 10 Co 207.

The letter or any other writing ~~which is to bind the parties~~ must distinctly furnish the terms of the agreement. Pr 62 [illegible] ~~[illegible] 426~~. 1 Salk 12. 2: [illegible] 428.

The letter to bind ~~the parties~~ must have been received by the opposite party, and ~~it must appear that he~~ the party accepted ~~the terms of~~ the agreement ~~contained in the letter, and then he acted according to those terms~~ because otherwise the minds of the parties could not meet. 2 Pr 65. 9 Mod 3: 2 Vern 397. 1 Ves 179.

An advertisement ~~written or printed by one of the parties~~ is sufficient to bind the party ~~who obtained it published~~ publishing it. Ruby 14. 1 Salk R 599. 3 Ven 1921. 1 Will 118

~~The Stat requires that the writing be signed by the party to be bound thereby. The general rule as to this is, that~~ If the name of the party is subscribed in any part of the instrument, with a design to give it authenticity

(1) Excepting in the single instance of rebutting an equity.

(2) It is said down in some of the Books that a necessary contract need not be in writing, but those cases are now completely overruled. — And surely there were many exceptions more opposed to the spirit of the Statute. These exceptions have grown out of that clause which speaks of the sale of goods wares & merchandize of above the value of ten pounds. There is certainly more reason to apprehend perjury when witnesses are called upon to attest a bargain, which happened long before, than when they are present. And there is likewise more scope for fraud & error when a transaction is in some measure observed by time than when it is recent. From the legislatures inserting that Contract for less than ten pounds which were not to be fulfilled within a year, it is manifest that they apprehended more fraud & perjury from secretly made contracts which were to be fulfilled immediately. — The courts have rid themselves from the operation of those cases by declaring that they were for work & labour & materials, which contracts are clearly not within the Statute. In the following cases the law is fully comprised on both sides. 2 H Blk 26.
4 Burr. 2101. Clayton vs Andrews
1 H Blk 26. Strange 506 Simon
vs Barber. 2 H Blk 65 — 7 Term 6
1 H Bl 20.

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(1) The rule ~~with regard to its not being merely~~ ~~that states at Creation should be in writing or~~ ~~imposed a duty upon the Creditor~~ does not apply to sales of land property. Walker v Constable 1 B & P 306. 1 W 599. 3 Mar 1921. Sup & P 6a 101.

it is sufficient signing. ~~Viz~~ E.g. I & B agree &c ~~is suffi~~ and the same rule applies in ~~the~~ cases of Wills. 2 Eq Ca Ab 20. 1 Vesy 8. 3 Atk 503. 1 Ford 67. 2 Vern 373.

* But if ~~When~~ the name of the party ~~is so~~ written in the body of the instrument, ~~that it~~ is not intended to give it authenticity, ~~now~~ it is not a sufficient signing. ~~Viz~~ E.g. The lease to be renewed. I & to pay the taxes &c ~~how inserting it~~ ~~name was not to give the instrument authenticity~~ 771. 1 Pow 285.

It was formerly held that if one of the parties made ~~a draught~~ an alteration in the draught of the instrument it was sufficient signing. But it is now settled otherwise. 1 Vent 221. 1 Atk 770. 1 Ves 166.

But subscribing ~~or signing~~ a writing as a ~~subscribing~~ witness ~~[illegible]~~ ~~The instrument contained~~ is ~~a~~ sufficient ~~signing~~ of the person signing knew its contents. ~~to bind him to any conditions needed [illegible] to have been made on his part.~~ ~~Viz~~ E.g. I & B in contemplation of marriage entered into a contract in which it was recited that C was to settle £1000. upon them; C knowing its contents subscribed it as a witness, ~~it having been read to him.~~ ~~[illegible] it was held to be a sufficient signing on the part of C to bind him to performance the conditions.~~ 1 Vesy 6. 1 [illegible] 316. 1 Pow 204.

~~If is sufficient~~ If one of the parties ~~has~~ signed the agreement, it is binding upon the other if he has had ~~evidence in his power of the~~ he acquiesced in it ~~as a form of the other party.~~ ~~Viz~~ E.g. I draws an agreement & procures B to sign it ~~then~~, I ~~refuses~~ afterwards refuses to sign it. ~~Still~~ ~~[illegible]~~ he is nevertheless bound. 1 Ven 270. 1 Eq Ca Ab 20.

~~And it is said~~ ~~[illegible]~~ A, in this case is considered as bound, because B's signing by the procurement of A, ~~makes the~~ signing authorized by A. 1 Eq Ca Ab 21. 2 Eq Ca 164.

An Auctioneer, subscribing the highest bidders name to the conditions of sale is considered as the agent of both parties & his signing is a sufficient signing to bind both parties. ~~So the auctioneer may be said to be the agent of both parties.~~ 1 Bro C P 280. 1 Wil Rp 599. 8 Bro 1921. (1)

It has been doubted whether sales at public auction were ever contemplated by the Stat, because ~~the [illegible] being in public, was~~ there is no danger of perjury in such sales. 1 Atk Rp 600. Bro C P 280.

If part of the contract is within the Stat the whole is so. ~~Viz~~ E.g. A in consideration of £100 promises B to pay I. S. debts & go to Hartford. ~~if parole is bad,~~ Tho altho the promise to go to Hartford would separately have been good by parole, yet when coupled with the promise to pay I. S. debts, the whole is bad. 7 Ves 201.

parole

Of the Action of Covenant Broken

The words Covenant, Contract & agreement are often used in law as synonymous, and in their general signification are so ~~synonymous~~. 1 Bac 244.5. 1 Bac 526.

The word covenant in its most appropriate signification denotes a contract under seal.

Covenants may be created by indenture, or by deed poll. By an indenture is meant a duplicate instrument ~~which is given to each of the parties.~~ ~~Both or all of the parties are contracting, are in the same form. One is called a duplicate or counterpart, the other~~ the edges of which edges are cut so as ~~exactly~~ to tally with each other. ~~This is the~~ ~~sense of the~~ ~~other~~ use that is given in the instrument. Co Lit 145. 3 Co 10.

A deed poll is a single deed, ~~not without a duplicate, and~~ by some it is called a shorn deed.

~~It is a~~ A covenant by indenture is binding, although ~~provided~~ it is ~~also~~ sealed only by the person against whom the action is brought. ~~He sealed it the indenture, altho the other party hath never sealed it.~~ Co Lit 212. 1 Sp 266.

The usual ~~remedy to enforce a~~ mode of recovering damages for covenant broken is by an action ~~at law~~ for damages for non performance ~~of it~~. However when the covenant is to do something specific as to convey land, to execute a deed &c. ~~the most common & proper remedy is to file a bill in Ch~~ will sometimes compel ~~compel~~ ~~specific~~ a specific performance. 1 Mont 27. 139. 156. 1 Bac 526.

It is a general rule that when a court of law ~~will~~ affords an adequate remedy the Ch will not grant relief. ~~to bring the parties at law, they may not resort to Ch.~~ ~~And it is a consequence of this rule that when~~ If the plaintiff prays a specific performance of a covenant, & the plff ~~can~~ only shows that he has a right to damages, the bill will not be retained. ~~Hence the province of Ch, has belonged to a jury to assess damages. The reason usually given in the books is because damages are not to be ascertained by the conscience of the Chancellor. But the former reason appears to be preferable.~~ 1 Mont 27. 139. 2 Mc Ch 341.

In cases where however in which the remedy lies in damages only, & ~~if~~ the relief prayed is consequential or collateral to a ground of relief properly recognised in Ch, the bill will be retained. ~~This rule applies to cases in which~~ Cases in which a ground is mixed with the damages. ~~Ex~~ If A sues B at law in an action

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of Covenant broken, B says Chancery for an injunction on the ground of fraud; A files a cross bill to obtain the damages he has sustained, ~~for~~ if no fraud is discovered the Chancellor will ~~send the parties to a Court of Law for a jury~~ direct a jury if he to assess the damages, and then he will decree B to pay A those damages. ~~However, had A filed~~ But if A filed his bill in the first instance, ~~to Chancery, his bill~~ it would not have been retained. 2 Vern 216. 2 Ch R 17. 1 Bac Eq. 526.

~~In Con in the example above the court itself or a committee by them appointed ascertain the damages according to the finding decree against the Deft at law.~~

All covenants are devided into two kinds, Covenants in Deed; & Covenants in Law.

Covenants in Deed are such as are expressly mentioned and recited in the agreement. ~~between the parties~~ 4 Coke 80.

Covenants in Law are such as are raised or implied ~~in law, not express, but implied~~ from something which is expressed. As if A leases to B for a certain time by the words Dede et concessi, these are ~~not~~ words of covenant, but the law implies a covenant that the lessee shall quietly enjoy the thing leased for the term. Co Lit 384. Sep 266.

The distinction between covenants by deed, and in law arises from the nature of the stipulation between the parties.

~~There is another division which arises from the nature & object of the covenant, viz of the thing covenanted; this division is~~ into covenants real & personal.

A Covenant real is that by which one binds himself to pass or convey things real. Dit, N B 343. Sep 294. Co Lit 159.

A personal covenant is one annexed to the person, as a sum of money, ~~to~~ personal services &c. Dit NB 145 5 Co 15 a 17.

Any form of words under a seal which import an agreement, is a covenant. 1 Rolle R 178. 1 Leonard 134. Brownlow 23. 1 Bac 527.

A Deed executes ~~to B &c~~ a conveyance to B, which contains these words "Reserving £10 rent per annum" ~~This is a covenant~~ ~~a "B paying A such a rent" amounts to a covenant~~. Co Ll 657. Co Lit 141. 2; 1 Ven 375. 1 Rolle R 519. Sep 267.

It makes no difference in the above cases whether the covenant is by indenture or by deed pole, or whether only one of the parties sign it. 1 Ven Co 271.

A covenant may be made to relate to something past, present or future. ~~One may covenant that he has not done such a thing, and if he has his covenant is broken. This relates to something past.~~ That a thing has not been done; That the covenantor is seised ~~All covenants of seisin relate to something present.~~ ~~All executory agreements relate to something future, if they are under seal this must be taken of executory agreements in the more limited sense of the word. For strictly speaking all covenants are executory agreements, All covenants of warranty are under this head.~~ or that the covenantor will defend &c. Com 308 a.

Covenants in deed & in law differ in this: — Covenants in deed are founded on ~~the words used, and they are expressed in terms. This is the case altho the words used are not the most explicit;~~ what is expressed; ~~Covenants in law are such as are implied not from the phraseology or terms used, but from the nature of the covenants which are expressed.~~ Contingently in law upon the nature 1 Co 80 b or 80 b. 5 Co 17. Cath 90. Paine. 388. 2 Mod 92. Esp 267.

~~The rule is expressed~~ It is laid down in the books that if in a covenant in law implied from the words Dedi et concessi, the lessee is evicted, he may sue the lessor in an action of covenant — Good thinks that a notice is not necessary, ~~the lessee should be evicted to enable him to sustain his action of covenant, and~~ In Cath 28. the judges took it for granted that the action would lie if the lessee had not been evicted, & Also Co 80. ~~for the~~ Covenant of seisin is broken by the fact of the lessee not having had title to the thing leased or granted. It has been so held in the Stat. of Uses &c.

~~A~~ Covenants in law are always ~~restricted by express covenants.~~ restrictably by express covenants. E.g. A leases to B by words "Demise &c" & the ~~but if these words follow thus~~ ~~that~~ the lessee shall enjoy the premises unmolested by the lessor or any person claiming under him. ~~By~~ By this ~~the lessee~~ restriction the lessee is not liable any liability arising from eviction by a stranger. Esp 175. 1 Co 80 b. 406. Cro El 675.

A mere recital in a deed of a parol agreement creates a covenant on which an action will lie. ~~For~~ E.g. "Whereas he has agreed to pay such a sum &c." This confirms the parol agreement by relation. 3 Keb 465. 1 Leon 122.

In all covenants in deed if the word "covenant" or some other apt word of ~~stipulation~~ stipulation is not used, ~~there must be some other words which import an agreement, else~~ no action will lie. ~~For~~ "Provided and it is agreed that the lessor furnish timber &c." Then the lessee may ~~sue for~~ sue for damages ~~if~~ if he does ~~not~~ not furnish the timber. But if the words "and it is agreed" are left out, no action would ~~will~~ lie against the lessor if he does not furnish it, ~~but only~~ the lessee will be ~~barred~~ prevented from ~~repairing~~. 1 Rolle Ab 518. Esp 267.

If a lease is made ~~for~~ for 60 years ~~for instance~~, and it is provided that if the lessee ~~of the~~ dies in a less time ~~that the term~~ his Ex. shall have the land for the remainder of the term, ~~this~~

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~~provision contra covenant~~ upon this covenant an action will lie.
1 Co 155. 1 Rolle Ab 518. Mor 478.

If one executes a bond conditioned for the performance of ~~to execute~~ all the covenants contained in his deed, it extends as well to covenants in law as to covenants in deed. 2 Coke 80.b

If a lease ~~is granted by it to the~~ contains these words "Provided ~~and~~ on condition that the lessee ~~does such an act~~" these words do not amount to a covenant on the ~~lessee's~~ lessee's part, but only a condition which will defeat the lessees estate. 2 Com Dig 560. 1 Rolle Ab 518.

As a general rule ~~when the~~ stipulation in a deed ~~is~~ in the nature of a defeasance, ~~an action of covenant~~ will not ~~lie upon that stipulation~~ support an action at law. Chancery however sometimes considers conditions precedent as agreements. 1 Sid 48.

~~Rules for the Construction of How Covenants ought to be construed~~

It is a general rule that all covenants ought to be construed liberally, ~~that is~~ according to the meaning of the parties ~~is to be sought~~ without ~~such a~~ so rigid an adherance to rules as ~~are~~ is necessary in construing deeds, grants and other instruments which convey a present interest. 1 Rolle Ab 419 Plowd Com 140. Co Lit 45.b 5 Ter 699.

~~The~~ A liberal construction of covenants is ~~the same as a~~ similar to a liberal construction of Stats.

In many instances a ~~liberal~~ literal performance of a covenant will not excuse the covenantor, ~~for instance~~ e.g. if A, ~~holding~~ by his bond holds a bond against B, agrees ~~that on a certain day he will~~ to deliver it to B to be cancelled, ~~and~~ by a certain time before that ~~day~~ time he sues the bond & recovers, and on the day appointed delivers it to B; ~~in this case~~ notwithstanding ~~because of the~~ he may have an action for breach of covenant. ~~Cotton~~. Co Ll 7a; 1 Sid 48. 1 Bac 539. –

A substantial & not a ~~literal~~ literal performance of the ~~bond~~ covenant will in some cases discharge the covenantor. e.g. ~~as~~ if A covenants with B that his son (who has not arrived ~~before the second~~ at the age of consent) ~~shall~~ ~~should~~ marry B's daughter, he does so, but when arrived at the age of consent ~~he~~ dissents to the marriage. ~~In this case~~ A is discharged from his covenant for the parties could have contemplated nothing else ~~the covenant~~. 1 Leon 52. Esp 270.

If lessee covenants that he will leave all the timber on the land which was there when his lease commenced. Before the determination of the lease he cuts down all the timber, but leaves it on the land

He is notwithstanding ~~liable for~~ ~~is~~ liable for breach of ~~in an action of~~ covenant. ~~Lockton~~. 7 Mod 464. 1 Ld Ray 276.

A covenants to deliver a certain quantity of cloth; but previous to the delivery he cuts it into pieces. ~~How far~~ He is ~~liable~~ guilty of a breach of the covenant. 7 Mod 464. Sid 151.

When the words of the covenant are uncertain, so that ~~the~~ ordinary rules of construction cannot determine what was the intention of the parties, the covenant shall be taken most strongly against the covenantor & most favourable for the covenantee. ~~Also~~ This rule applies equally to all instruments, but ~~must resort~~ should not be resorted to until ~~all~~ the other rules of construction fail. ~~Eg~~ E.g.

A covenanted that if B would marry his daughter, he would ~~pay~~ give them £20. The Court held it should be paid during the covenantees life; ~~for an interest during a persons own life is far better than for the life of another~~. 1 Lev 102. 1 Sid 151. 1 Bac Abr 539.

In some cases an exception in a lease amounts to a covenant on the part of the lessee, and in some cases only to a condition.

~~There is a distinction, as to the rules of construction, between covenants expressly & impliedly.~~

Express covenants are to be more strictly construed than implied. E.g.

— If a man expressly covenants to perform a voyage in a certain time, ~~or to do any other act~~, unless he performs it he is ~~guilty of a breach of covenant~~ liable, altho the act was rendered impossible by causes altogether beyond his control. 3 Mod 1637.

~~If a the covenantor becomes an insane and must bear the loss.~~

So also if ~~the~~ a lessee covenants to pay the rent of a house for 20 years, and ~~the first year~~ the house is burnt down by lightning, ~~yet~~ he is still bound to pay the rent during the ~~whole~~ twenty years. 7 Ve 708. 710. L.d Ra 1477. 2 Str 763. Dyer 33. In this case it was made a question ~~How far this a question~~ ~~Whether~~ Whether a Court of Equity had ~~no~~ power to relieve the lessee. ~~About a century ago~~ It was first agitated about a century ago, & not determined. 1 Ch Ca 3. And ~~also~~ again when Ambler reported 619. ~~It was not then judicially determined, but~~ ~~but~~ The chancellor ~~appeared~~ inclined in favour of the lessee. 7. 1773 ~~by Ch.~~ — it was decreed that the lessee should be discharged. Fonblanque is of a different opinion. It is now settled that the lessee is liable. His equity is only equal to that of the ~~obligor~~ lessor ~~in law~~ where the equities are equal the law always prevails. 1 Fonb 366.

(1) This rule must be understood to relate to covenants wh. are expressed in the lease stated in it: for if a covenant is to pay all taxes &c. wh. may be laid during the term – the covenantor must pay them.

~~& such is now settled to be the law in some other Courts~~ ~~opinion~~ Says that a court of equity cannot contravene a common law Law rule; and it never was pretended that they could any further than if there were certain equitable circumstances appeared, which courts of law could not take cognizance of. In this case they cannot say the rule was not formed to meet such a case; for by the very terms of the rule it meets such a very case as the rule says "if the thing demised be destroyed &c" But further it is a general rule that when the equity is equal the law must prevail. Here the property being completely destroyed ~~the equity is equal & the law must consequently prevail.~~ 1 Font 360 &c.

~~No implied covenants~~ ~~such accidents as happen by the~~ It is impossible to property implied covenant is exempt from the Act of God, inevitable accident, or public enemies will excuse the covenantor is thereby excused.

Every lessee impliedly covenants not to commit waste, but if ~~the~~ waste happens by the Act of God, or ~~of the Kings~~ public enemies ~~it~~ he is excused ~~the covenantor~~ 1 Font 360. ~~For when the law creates an obligation such obligation is always to be liberally expounded.~~

The general rule ~~that~~ performance of express covenants is not to be dispensed with by any collateral matter, admits of ~~some~~ exceptions. Esp 270. ~~If~~ If a man covenants to do an act lawful at the time of covenanting ~~and~~ but which afterwards ~~a~~ it makes ~~the doing of it unlawful~~ and ~~the~~ that the covenantor is excused, ~~because the act~~ that makes it ~~morally impossible that the act should be done.~~ Salk 198. If the other hand a covenant is entered into ~~covenants~~ not to do an act ~~lawful~~ which is in itself lawful to omit doing but which afterwards ~~and~~ at the time of covenanting ~~and a~~ ~~the~~ afterwards ~~makes it his duty to do it~~ makes it his duty to do it, the covenantor is excused ~~Dispensed with~~. Salk 118.

~~Where on~~ A covenant not to do an act ~~which~~ which it is afterwards made lawful to do at that time, but which ~~and a~~ ~~it is~~ ~~afterwards made making the doing of it lawful, the~~ ~~Contract~~ continues binding. 1 Salk 19. & 198.

It is a general rule ~~that~~ ~~that construction of~~ covenants ~~that they are~~ covenant shall be confined in their operation ~~respecting any subject matter~~ to such things as are ~~that subject in the~~ being at the time of making the ~~covenant~~ ~~they~~ ~~it~~ lessee covenants with the lessor to pay all ~~the~~ taxes, ~~then~~ he is only bound to pay ~~those~~ such taxes ~~only~~ ~~which~~ as were imposed at the time of making the lease 1 Lev 60. 2 Wms 223. 3 Ter 377. 2 Show 191. (1)

A covenant ~~entered into~~ which is contrary to law or good policy is void. ~~The policy of the law is public policy~~. 4 Burr 2225. Cowp 129. 341. 1 Ves 164. 3 Ter 17.

~~An assignment of a chose in action is an implied covenant that the assignee shall have all the benefit of that chose in action.~~

A chose in action by the common law was not so assignable as to give the assignee a right to recover in his own name. It was considered a species of maintenance. Co Lit 214. 2 Roll Ab 45. 5 Co 621.

Altho' the assignment of a chose in action implies a covenant that the assignee shall have all the benefit of ~~them~~ it, the assignor had ~~before the assignment~~, yet this does not take away the right of the assignee to discharge the covenant; but if he does discharge it, he is liable in an action of covenant to the assignee. 2 Ba Ab 683. 1242. 3 Rebl 304. 1 Ves 118. Co Lit 214. 2 Roll Ab 45. 5 Co 621.

In this case ~~above~~ the practice in Con^t is ~~not to bring an action against the assignor on the covenant, but for~~ to bring action for fraud. The assignee has ~~also~~ an action against the assignor of the original debtor provided he gave him notice ~~before the~~ of the assignment ~~had~~ discharged it ~~such chose in action~~.

The practice formerly was to petition G.A., but ~~now~~ the Superior Court of Connecticut have lately decided that ~~in such cases~~ the petition will not lie, because the assignee has his remedy at Com Law for fraud.

It was formerly the prevailing opinion that an assignment of a chose in action ~~should~~ must be by writing, but it has lately been determined ~~that it was not necessary~~ by the law by parole, because all the interest conveyed is of a personal nature, which never was required to be in writing; for before the St of frauds & perjuries no contract was required to be in writing except an Indenture ~~and this case cannot be under the provisions of that~~ Stat. 29 Ch 690.

But the above rule does not extend to deeds of real property, for ~~such~~ they are required to be in writing.

A covenant by a creditor not to sue his debtor within a certain time is no bar to an action ~~brought by~~ against ~~the~~ debtor ~~within that time~~; but it only gives ~~the debtor~~ him a right of action ~~against the creditor on~~ on the covenant. Co Lit 352. 1 Show 46. 3 Lev 41. Carth 63. Salk 573. Ray 187. 393. 413.

If such a covenant could be pleaded in bar it would operate as ~~a temporary~~ release ~~& the par would have a lasting bar. The~~ for it is a maxim ~~is~~ that "a personal action ~~if~~ once suspended is forever gone." Hob 10. 2 HB 10 a note. ~~Except in the bankr. Not this rule does not apply to real actions. May however be suspended & revived again~~. 2 H Blk 4.

A covenant in general that the creditor will never sue his debtor is a complete & perpetual bar, for it operates as a release & ought so to be pleaded; yet it would not be ill to plead

it as a covenant. Cro El 352. 1 Rolle 989. 1 Mon 23.

2 Bulst 95. 290.

This last rule is adopted to prevent a multiplicity of suits, for otherwise the creditor might recover on the debt, & the debtor immediately after recover upon the covenant 1 Ve 446. It has also been decided that a covenant entered into in a foreign country by seamen not to sue ~~this~~ master in any country but ~~their~~ their own, is a good bar. ~~to any action~~ ~~they may bring in any~~ to a foreign country 2 H Bl 603.

Altho a special covenant not to sue ~~the debtor~~ within ~~such~~ a limited time is no bar to an action, yet if the it is further covenanted that in a suit so brought the covenant ~~Creditor grants to the~~ debtor that he would not sue him within such a time & if he should ~~that he~~ he might plead the covenant in bar, as that the obligation should be void, or be forfeited; ~~these additional constraints~~ words ~~form~~ form a complete defence. ~~form a good bar to any action which the creditor might bring.~~ 1 Rolle 339. 4 Ba 266. Carth 64. 210. Comberback 123. Holt R 619.

~~Of the ordinary deeds of land used in the conveyance of land~~

In all deeds of conveyance ~~except~~ excepting quit claim deeds, there is a covenant of ~~seisin~~ seisin and a covenant of warranty. These two covenants are usually expressed, but if they are not ~~expressed~~ they are always implied. 4 Co 80, 1 Rolle Ab 519. 520. 2 Mod 92. Dyer 257.

A Covenant of ~~seisin~~ seisin is ~~a covenant by the grantor to the grantee~~, that the grantor is well seised & possessed of the ~~land granted~~ premises.

A Covenant of warranty is ~~a covenant whereby the grantor covenants to warrant & defend~~ to defend the grantee from all incumbrances whatsoever.

In a covenant of ~~seisin~~ seisin the grantee may sue the grantor either before ~~as well as~~ or after eviction, and it is sufficient to maintain his action to shew that ~~he was~~ the grantor was not well seised; he is not obliged to shew who was ~~seised~~. Esp 299. Co Ent 369. 170: 9 Co Co. Kelby 3.

If the grantee shows that he was seised ~~the same probandi onus~~ it is then incumbent upon the grantee to shew that ~~some~~ an other person has a higher title. ~~than that of the grantor~~. Co Ent 369. 9 Co Co. Esp 299.

In a Covenant of warranty the grantee ~~or warrantee~~ cannot maintain an action until after eviction. He must therefore state that he has been evicted or disturbed upon a claim of title, and also that the evictor had a better title than the grantor. It is not sufficient to state that he had a good title, for perhaps it might have been derived from ~~the grantor~~ the party himself; ~~but it must be stated that the evictor had a better and an other title than the grantor~~. 4 Co 80. Co Ent 315. 4 Ve 617. 1 Lev 466. 2 Saund 177.

If it appears on the face of the declaration that the eviction title was older than the grantors, it need not be formally stated. But it must appear to be older. 2 Lev 37. 4 Ter 617. It is not necessary to state what the title of the eviction was. 2 Lev 37. 4 Ter 614.

It is holden in Sid & Saund: that it was necessary to shew what the title was, but this is not law. It is sufficient to state that it was a good title & older than the grantors. 1 Sid 466. 2 Saund 177.

The reason why the eviction must be stated to be by a tortious title, is, because the covenant of warranty is not broken by the tortious acts of a stranger. Hob 34. Co Ll 97. Show 245. Stg Abr. 3 Ter 484. 4 Ter 619.

One may however expressly covenant against the tortious acts of others, in which it is not necessary for the grantee to aver he was evicted by a person having a good & older title. Sty 273. 4.

So also if he covenanted to defend the thing granted against the acts of a particular person, this extends to the tortious acts of that person, altho tortious acts are not mentioned in the covenant, for the covenant not being general, the law supposes it was the intent of the parties to defend the title against all acts of that person. Hob 35. Co Ll 212. 1 Roll 521.

If the grantor disturbs the grantee even by a tortious act under claim of title, he is liable on the covenant of warranty. In such a case has not the grantee stated an assumption of title by the grantor. A claim of title by a tortious act is an assertion of right. Burning down a house by the grantor would not be such an act as would amount to an assertion of right. But the grantors using a screw which he had granted would be such an act. 1 Ter 671. 1 Roll R 21. 2 Sho 425.

The same rule holds when the tortious eviction was by the heirs, executors, or administrators of the covenantor. 1 Roll R 21. Dyer 257. Sty 302. 2 Com 564.

A covenant by executors, as for quiet enjoyment, tho' expressed to be against all persons whatsoever, is restrained to themselves or persons claiming under them. Gould thinks this rule is not founded in principle. 1 H Blk 44. Shep Touch Stow 163.

~~In Eng the rule of~~ The rule for estimating damages ~~then~~ is a different ~~between~~ in a covenant of seisin, from what it is on a covenant of warranty ~~in Eng~~ ~~Also the rule of damages is different in Eng from the same as in Eng.~~

~~In Eng~~ If the plff recovers on a covenant of seisin, he recovers the consideration money, and interest, ~~upon this~~ ~~money~~. In a covenant of warranty, he recovers the consideration money & special damages for being evicted.

In Con the Plff recovers on a covenant of seisin the consideration money & all his damages. On a covenant of Warranty he recovers the value of the land at the time of eviction. Kerby 3. In Con it is decided, that on a covenant of seisin the assignee of the grantee cannot bring his action against the original grantor, because the covenant was broken as soon as it was executed, & the grantee becomes but a chose in action & consequently can not be transferred. Lyn vs Fytheny. 1 Sp 295 [illegible] has been made in the State of New York.

If an action of ejectment is brought against the grantee by a third person, it is the business of the grantee to notify the grantor, that he may appear & defend. This notification is called vouching in the grantor, when the interest in question amounts to a freehold. 3 Wil 200.

If the grantee neglects to notify the grantor & he is ejected, he can only recover from the grantor the consideration money he has paid & not the whole damages. But if the grantee notifies the grantor & he neglects to defend, special damages can be recovered against him. The matter of vouching in obtains only in real actions. 1 Rac 372. Lit 101. 365: 5 Com. 614

In consideration in case of fraud a grantor who conveys by a quitclaim is answerable in an action of assumpsit for the consideration to the grantee, when there is a defect of title, in some instances. In Con. The rule is — If it is a bona fide contract at Hazard he cannot recover for a defect of the title, if not the consideration is recoverable. The deed is not conclusive evidence that the bargain was a bargain of Hazard.

If one of two covenantors suffers judgment to go against him by default, afterwards the other obtains judgment against the Plff, on the gen issue or some other plea. The Plff cannot take judgment against the one who suffered the default. This rule applies equally in all actions founded on contract, as the rule is if one of two joint obligors are released, of course both are. But it does not apply to torts, for torts are several, the contracts are joint. In an action for a tort one of the Defts suffers judgment by default, and the other justifies by a plea which extends the justification to both, the Plff cannot take judgment against the one who suffered the default. Bul N P 188. 1 Rull 284. Cro Jac 134. Carth 361.

The rules with respect to covenants to pay a certain aggregate sum by instalments, & to pay certain specific sums at stated times having no aggregate, are different. On a penal bond conditioned for the payment of certain aggregate sums at different times the action of debt will lie for the whole penalty on the first breach, notwithstanding the sums are at the time stated. In a bond

conditioned to pay £20 in three months and £20 in twelve months, on penalty of £100 here if the £20 is not paid in three months the whole of the bond with the penalty is forfeited. 1 Wilson 80. 11 Wh 118. Sho 515. 814. Co J 558. Bull NP 168.

On a covenant in deed for the payment of a sum of money, the action of debt, as well as ~~an action~~ of covenant will lie. Sh 1086. Bull NP 167. Plac 429. Co H 561. 758. ~~a contract~~ in ~~in~~ ~~the payment of~~ ~~sums~~ sums at various times ~~on a bond with various penalty~~

On a single bill ~~for the~~ ~~the action of~~ debt will not lie until after the last instalment has become due; for ~~the reason is this~~ there is but one entire contract which cannot be severed. 1 Rolle 600. Co Lit 292. 2 Ld. 1016 820.

Coke when speaking of bonds means ~~a~~ single bills & not ~~a~~ bond with a penalty. Bull NP 168. Sep 205.

In Con there is a Stat which provides that when an action is brought on a bond conditioned to be paid in aggregate sums at stated times, on the first or any subsequent breach that the court shall order the sum due to be paid, & a proportionate part of the penalty.

In covenant or promissory note is given for the payment of ~~an aggregate~~ ~~sum~~ sums at different times, ~~the~~ an action of debt will lie until the last payment becomes due. Co El 807. Co Lit 292. 1 W Bl 548. 552. 554.

~~But on a covenant or promissory note for the payment of an aggregate sum at different times~~ But an action of covenant in the first instance, & of assumpsit in the last, will lie on the first breach. 4 Co 94. 8 Co 153. Bul NP 165. Co El 776. 807. and 17. 1 W Bl 547. This rule is denied in Co El 180.

In the actions of covenant and assumpsit ~~an attempt to recover~~ such damages only as have actually been sustained; in ~~but~~ debt ~~lies to recover~~ ~~the penalty upon~~ the whole penalty ~~entire contract~~. Sep 266. 172. Bul NP. 167.

If ~~the contract is to~~ in the same instrument it is agreed to pay several sums at ~~several~~ various ~~different~~ times, ~~and they are~~ & yet on the same not being an aggregate sum, the action of debt ~~may be brought to~~ will lie to recover ~~the~~ sum which at that time is or may be due, ~~because~~ because each is a distinct, independent, & substantive undertaking. 1 W Bl 550. Co El 118. 776. 807. Bul NP 168.

~~On the~~ If now by inserting the words the action of assumpsit ~~there has been a revolution~~ would lie in the above case. ~~Formerly~~ It was at the time supposed that assumpsit would not lie, ~~to recover an aggregate sum due at different times~~ & it was afterwards held that ~~in such a case~~ it would ~~lie~~ but that the whole ~~sum~~ of the penalty or sum due ~~bond covenant, or note~~ must be recovered. But it is now established ~~that the action of assumpsit~~ that it will lie in such a case to recover the instalment due at the time of bringing the action; ~~time~~ to recover so much but no more than may be due when it is ~~if~~ reserved to be paid at various times, ~~either partly or wholly payable at different times an action of debt will lie to recover only the sum due at the time of bringing the action~~. 10 Co 124.

X In an action of covenant the pltff may assign as many breaches as he pleases, ~~for covenants often contain a number of stipulations of which may be broken~~. But in an action of Debt on a bond only one breach can be assigned on record, for any one breach amounts to a forfeiture of the whole bond or penalty. Co Ch 126. 2 Crust 198. 3 Crust 297. Salk 108. 2 Will 293. This rule of Common Law ~~with respect to bonds~~ is exploded in Eq, & the pltff may assign, ~~as many breaches as he pleases~~, on bonds ~~given~~ for covenants ~~to deed~~. 1 Bac 544. 2 Will 377. 2 Vez Jr 1016. 1111. 2 Bac 870. 8 Ju 126.

If however, at Common Law in actions on bonds, given otherwise than for covenants to deed, the pltff assigns several breaches, the Deft can take advantage of it no otherwise than by special Demurrer, for it is a mistake merely in form, ~~and it is a general rule, that duplicity in pleading can be taken advantage of only by special demurrer~~. 4 Bac 135. Comberbach 297.

It is a general rule that the executors & administrators of a covenantor are implied in himself, & ~~they~~ are bound without being named. 1 Pow Co 128. 2 P Wms 197. 1 Vern 519. Dyer 14 a.

But when the contract is ~~fiduciary~~ personally, the executors are not bound unless they are named. ~~e.g.~~ A Joiner covenants to build a house, but dies before he has built it, his executors are not bound unless they are named. Nor are they bound to instruct the Apprentices of the deceased. Co Ll 553. 1 Ro 533. 1 Ed.

Any person seised of lands tenaments or hereditaments in fee, may at Com Law bind his heir by a covenant, ~~and it is generally true, that~~ The money received on such conveyance will generally go to the personal representatives of the testator. 2 Vern 213. Dyer 330. a

It is a general rule that covenants real bind the heir of the covenantor, & descend to the heir of the covenantee. Fitz 1 Bl 343. 2 Com 561. 2 Shin 305. 7 Lev 92.

A leases lands to B for 60 years, B covenants to leave the land in good order at the end of the term; the heirs of A may maintain an action on the covenant.

It has been ~~holden~~ held in Con^t that the heir ~~of a covenantor being a party by descent from his ancestor, is~~ was liable as well on the covenant of seisin, as on the covenant of warranty. ~~On principle~~ Mr Gould thinks this questionable, because the right was vested to a mere right of action in the life of the covenantor; which right of action was merely personal; therefore the action ought to be brought against the Ex.

The assignee of a lease is bound by the covenants on the part of the lessee ~~contained in the lease~~, provided they ~~covenants of the lessee~~ run with the land. 1 Vent 345.

A covenant is said to run with the land when ~~the thing covenanted to be done, or a clause~~ it relates to something to be done is in esse at the time of the lease & is part or parcel of the thing demised or leased. E.g. ~~thing~~ A leases land to B for 20 years, who covenants to repair the buildings; after holding it 10 years B conveys the remainder of the term to C. ~~Their being a covenant running with the lease land~~, C is also bound; ~~for it was in esse at the time of the lease, & parcel of the thing demised~~. 1 Rolle 521. Dyer 73. Co Ll 457. 5 Co 16b. 24. Mor 399. 2 Com 564.

A covenant to pay rent is one which runs with the land, ~~for~~ the land being in esse, the rent arising out of the land is ~~potentially~~ potentially in judgement of law ~~or~~ in esse at the time of the lease. 1 Ro 534. Co Ll 303. Watt v P 159. Mor Rep 357. 1 Ro Co 236.

A covenant which does not run with the land does not bind the assignee unless he is named. As to build a new wall, ~~to make a new~~ house, or ~~to make a new~~ repair ~~on the land leased for~~ ~~the~~ they do not run with the land ~~for~~ because they neither actually nor potentially existed at the time of the lease. 5 Co 15. 3 Mu 1279. 2 Ve 393. 1 Bac 534

All covenants not running with the land are called collateral covenants. Co Ll 552. 3.

A covenant runs with the land if it goes to support the thing demised, ~~as if he covenants B for 20 years, who covenants~~ as to repay all charges ~~on~~ concerning the land, ~~B conveys the lease to C, C is bound altho' he is not named~~. Co J. 128. 3 Lev 233. Ray 303. 1 Lev 215. 2 Ven 228. 232: 4 Mod 91.

(1) The assignee of a lessee, when ~~the word~~ "assigns" ~~is~~ are mentioned in the lease, are bound to fulfil ~~all~~ the covenants contained in the lease, ~~whether~~ regarded whether they ~~they are covenants running~~ with the land ~~or not~~ or not. 5 Co 16b. 1 Ro 534.

If however the covenant of the lessee does not relate to the thing demised, altho' the ~~assigns~~ are mentioned, the assignee is not not bound. ~~by the covenant~~. 5 Co 15. 16. Co J. 438. Jones 223. 1 Bac 534. 2 Com 562. 564.

When the assignee is bound it is only for rents incurred or covenants broken during his ~~own~~ possession. 1 Freman 336. Holts Cases 177. 3 Mu 127. Ray 388. ~~The Ct holds even when the assignee is not named in the covenant. 1 Freman 336.~~

An assignee of a lessee is not bound after ~~he assigns~~ he has assigned ~~to a second assignee~~, for any covenant broken after assignment. Carth 677. 1 Ford 350.

If the assignee assigns his lease even the day before the rent becomes due, he is not liable for any part of the rent; because rent is not apportionable, ~~but according~~ ~~interest, & none is due until the whole is~~. 3 Co 22. 1 Salk 81. 4 Mod 91. Dow Mort 12[illegible]

(1) If the lessee covenants to resume a certain number of acres yearly untilled, if he assigns his term, the assignee is bound to resume the acres untilled, altho' not named.
Co. Ll 128. 3 Lev 233. Ray 303. 1 Lev 215.
2 Vent 228. 232. 4 Mod 71.

If on the day of payment the assignee assigns his lease to a stranger for the purpose of avoiding the payment of the rent, he is ~~not liable~~ thereby released tho' there is a contrary opinion in 1 Vent 329. 331. 2 Show 1281. But cf P. 159. Hob. 72. 166.

Chancery however will oblige such an assignee to account for the rent during the time he possessed the land. 2 Ven 165. 87. 1 Ford 351. 353.

~~It is a question whether~~ Chancery has not under any circumstances the power ~~could~~ restraining an assignee from assigning his lease; ~~it says to assign a lease is a right~~ for this that is incident to every Nature of lease. ~~Therefore Chy has no right to take away that lease privilege. Besides if an assignee does assign, the lessor has his remedy, for chancery will oblige the assignee to account for the rent during the time he possessed the land.~~ 1 Vk 219. 548. 1 Ford 351.

It was formerly doubted whether a covenant by the lessee that he would not assign was binding; but it is now settled that ~~such a covenant is binding~~ it is. 8 Ve 57. 2 Ve 133. Esp 276. A covenant by a lessee not to assign is not violated by an assignment effected by the act, or operation of law; for such an assignment passes in invitum. 7 Vin 85. Dyer 6. 2 Lyt Ca 190. 8 Ve 57.

~~Not~~ is such an covenant violated by an under lease of part of the terms ~~nor~~ by devising the term. 2 Blk R 75. Stiles 483. 3 Will 234.

It is not to be inferred that whenever the assignee is liable that the lessee is excused; for it is a general rule that the lessee is ~~always~~ liable to the lessor on his express covenants, even after assignment. The lessee is bound on the ground of privity of contract; the assignee on the ground of privity of possession. 3 Co 22. Pow & Mt 91. Pop 120. 4 Ve 98 Salk 199. If after an assignment by the lessee, the lessor accepts the assignee for his tenant, either by an express act, or by receiving rent &c. he is barred from bringing the action of Debt for rent against the lessee in any case, because the privity of estate is gone. Cro Jac 324. 1 H Blk 444. 3 Co 23. 1 Hen Blk 349 a note. 1 Ford 354.

But if the covenant be express, the lessor may ~~maintain the~~ maintain an action of covenant against the lessee. Bull N P. 159. Cro Jac 3. 522. Cro Jac 188. 1 Sid 402. 447. The lessor accepts the assignee as his tenant.

If however the covenant is only an implied one, he cannot have been an action of covenant. Cro Jac 522. 1 Sid 447. 3 Co 22a. 1 H Blk 439.

The lessor may receive the ~~lessee~~ assignee either by express act, or by any act which shows that he assents to it. 1 H Blk 409 a note.

When the covenant is express the lessor may pursue his remedy against the lessee & assignee at the same time, but he can obtain satisfaction only against one, ~~but~~ if he attempts to obtain satisfaction ~~against~~ out of both, he will be stopped by ~~the party pleaded judgment~~ an audita Querela. Cro Jac 523.

By a Stat of Hen 8. the grantee of the Lessor has the same remedy against the lessee on covenants running with the land, as the lessor himself & his representatives have at Com Law. Also the ~~Lessor~~ lessee by the same Stat, shall have the same remedy against the grantee of the reversion, as he had at Com Law against the lessor. Co Lit 215. 3 Co 22. Cro Jac 522. 1 Ven 345.

An under tenant or derivative lessee is one who takes a conveyance of a part of the remainder of the term, or of the whole term in character of tenant to the lessee.

An assignee of a lease, is one who receives the term of the lessee, but holds it under the lessor. Stra 405. 3 Wils 234. 2 Wlk R 766.

A derivative lessee is never liable to the lessor on the covenants contained in the lease, because between them there is no privity of contract. ~~Neither is he liable for a distress for rent~~. 1 Vent 347. Doug 174.

That the assignee of the lessee is liable on the covenants of the lessee. ~~whether the assignments are actual, by devise, or vested on execution~~. ~~This rule was admitted by all sides on execution~~. ~~This rule was admitted in argument~~. Doug 177.

If a lessee covenants for himself & his assigns ~~so~~ long as they continue in possession, & the assignee continues in possession after the lease has expired, ~~they~~ he is ~~co~~ liable on the covenant, for altho at such time the possession is not strictly an assignment yet it is a maxim of Law ~~but~~ that a writing is to be so construed (if possible) as to mean something rather than nothing, ~~unless absurd~~. 2 Com Dig 662. Stiles 407.

In an action on a covenant running with the Land against the heir of the covenantor, it is no bar to the action that the heir is an infant; for the objection that an infant is incapable of making a covenant will not apply in this case; because the covenant is the covenant of the Ancestor & not of the heir. 4 Ha 77. The heir must plead & pray the parol to demur.

In an action of covenant broken on a covenant contained in a lease, if the Plff narrow the breach first assigned by subsequent words, he must confine his proof to the breach assigned in the subsequent words. ~~So when the~~ E.g. A lessee covenanted to use the land in a husband like manner, & the Plff ~~avered in his declaration~~ that the Deft had not used it in a husandlike manner, ~~by~~ but had committed waste. Here the first assignment is general, & the Plff, had he not narrowed it by alledging the particular breach, might have proved any breach, but he ~~can now~~ ~~proof~~ ~~be at the~~ (now) restricted the assignment to waste & ~~there~~ ~~the~~ ~~commission of waste~~ ~~by proving the~~. 3 Ha 307.

~~Heirs. Action on breach of Covenants~~

~~Of the Liability to sue on the Covenants of the Heir~~

Heirs are implied in the Covenants ~~of the testator~~ ~~a interest~~ without being named, ~~they being persons~~ ~~representatives, for their death stand in their place~~ ~~But~~ yet it is usual to name them. This rule holds in ~~although it~~ ~~is~~ covenants real, ~~for it being~~ ~~broken during the life time~~ ~~of the covenantor~~ as well as in personal covenants ~~covenants~~ ~~it is reduced to a mere personal right, which~~ ~~while~~ ~~always goes to the~~ ~~personal representatives of the deceased~~ ~~for~~ is liable to answer for ~~the~~ ~~the covenant~~ ~~relating to the reality~~ ~~broken during the lifetime of the covenantor~~ it is taken to a ~~mere personal right~~ ~~which the personal representatives alone is entitled to sue for~~ 2 Com Dig 561. 1 Crut 176. 347. 2 Bulst 159.

~~But~~ if the covenant real is not broken until the death of the covenantor, his heir is entitled to the action of covenant broken, for this covenant until broken is considered as a real right, & descends to the ~~heir~~ representatives of the ~~heir~~ ~~ancestor~~ real estate. ~~Ibid~~ 2 Bulst 158. 9. Salk 141. 2 Lev 92.

~~Of the liability of the Heir to be sued on the first covenant~~

~~It is a general rule, that the heir of a covenantor, are liable to be sued on the covenants, tho' not named in it, when the right of action accrued in the life time of the testator. If the covenant is a real one, the reasons are the same as above.~~

~~If the covenant be expressly the heir is liable for its breach, tho the covenant was not broken until after the death of the covenantor, & tho' they are not named. This rule extends to all covenants expressly~~ 2 Com 563. 1 Roll Ab 519. Dyer 140. 2 PW 197. 1 Pa Br 110.

~~To the above rule there is this exception viz. If the covenant terminated on the death of the covenantor, the heir are not liable when the breach happens after, tho the covenant be expressly. As in case of a fiduciary covenant. In a covenant in law the heir is not liable ~~when the~~ for a breach happening after the death of the covenantor.~~ Dyer 257. a 1 Com 563. Bull 157.

~~If heirs are so mentioned liable on the covenants of their testators & intestates as assignees, as where they were named in the lease. Then they stand in the place of the lessee, & represent him, & in such case they may be sued as assignees during their possession according to the ordinary rules respecting assignees, but they are not liable de bonis propriis until a scire facias issues upon a non est inventus returned by the Sheriff.~~ 1 Will 4. Salk 309.

~~Of the heirs liability on his ancestors Covenants.~~

It is a general rule that the heir is liable on the covenants of the Ancestor, for breaches happening after his death, provided he is named in the covenant, and to the amount of the real assets which he received by descent from his ancestor.

It follows from this rule that the covenantee may have a concurrent remedy against the Ex & heir at the same time, tho it is usual for him to pursue his remedy against the Ex, for if there is personal property sufficient it must finally come out of that fund. — The Deceased may also bind his heir in a bond. ~~Provided the heir has assets sufficient from the Ancestor.~~ Lit 294. 7 Hen 357. Litt sect 207. Co Lit 384. 65. 70. 73: 2 Blk 378.

In Con it is the practice to sue the Ex or Ad for all breaches of covenants of the deceased, whether it was a real or personal covenant, & whether the breach happened during the life of the Covenantor, or after. For the real estate (or default of personal) is assets in the hands of the Ex or Ad for the payment of debts, & may be sold by obtaining ~~an order~~ an order from the court of probate, yet notwithstanding the heir had, the assets might be made liable.

~~Of Covenants to save harmless.~~

A Covenant to save harmless is a covenant to save the covenantee harmless from all damage, costs, trouble &c which may arise out of some contract, or transaction. As when A enters into a bond with B as security for B, to C. & B enters into a bond to A, to indemnify A against the bond given to C. So also a bond to save harmless may be given to save harmless of something else.

A Covenant to save harmless is not broken by the tortious acts of third persons. But ~~they~~ it may be covenanted specially (as was before mentioned) ~~in covenant of warranty~~ to save harmless from the acts of third persons.

A Covenant to save harmless from the acts of a particular person, is holden to extend as well to the tortious, as to the lawful acts of that particular person. Lit 275. 6: 1 Roll Ab 432. 4 Co 80. 6 Ch 443. 1 Mod 219. 1 Sty 400. 6 H 212. Hob 55: 1 Roll 431. 2 Lev 37.

There are certain cases in which a Covenant to save harmless is broken by the mere ~~liability~~ exposure ~~of the Covenantee to be exposed~~ to any ~~to which the bond was intended to secure against~~. ~~Whereas in other cases the covenant is not broken until there has been actual damage sustained by the covenantee.~~

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(1) In this case & presumption only nominal damages will be allowed. 10 John R 549.

If for instance (when a bond from a prisoner conditioned that he shall not break the rules of the prison,) ~~a Sheriff suffers a prisoner to have the liberty of the rules, and~~ takes a bond to indemnify him against an escape, ~~the condition of the bond is broken on the prisoner leaving the rules of the Sheriff~~ the Sheriff may ~~sue on the bond~~ (without an action first being brought against him) ~~for the breaking the rules, altho' the Sheriff has not suffered any damage~~ ~~has received no actual damage~~; for if his liability would not entitle the Sheriff to sue, he would run a great risque of losing the debt, as he could not retake the prisoner. C Rl 33. 123. Root 510. 10 Johnson 549 (1)

If ~~in the case taken~~ A being indebted to B, prevails C to join with him in security for the debt, payable in six months, and gives C a bond to indemnify him against this security. The bond to save C harmless is broken by A's not paying the debt by the appointed day, & C may sue A on the ground of his liability to B. 2 Ld 3 Wilst 234. 5 Co 25. Root 507. 1 Ld 599. 2 Ld 640. 3 Ld 777. 5 38. a. 9. 4 Ld 714. 5 H 307. 7 H 99. 3 Will 271. 347.

~~The Question whether the liability is sufficient to entitle the obligee of the Covenantee bond to save harmless to sue in Law has been decided Always by the Supreme Court; but is now settled by the Supr Ct of Errors in the Affirmative. 2 Swift 156. Root 107.~~

~~But if the obligee of the bond of indemnity, before the loss happens, or before the loss happens, his own liability has attached, he cannot sue on the bond till he has received some special damage in consequence of the note.~~ ~~For if A gives B a note to B payable on demand & gives B a bond to indemnify him against the endorsers, A cannot sue upon the bond to indemnify him against the note, until he has received some special damage in consequence of the note. For his liability was attached to the bond.~~ Salk 196. 2 Wilst 234 Root 507.

~~In many of the last mentioned cases~~ If the obligee has been compelled to pay the bond of indemnity ~~to the security on this~~ (this obligee) liability, & afterwards pays the ~~debt~~ demand which his bond was given to insure ~~the surety~~ against, he may compel the ~~surety~~ obligee to refund. ~~The money paid on the bond by mistake~~ by filing a petition in Chancery. ~~a petition in Chancery~~. 2 Ld 104. 105. Goulds apprehends Indebitatus Assumpsit would also be a proper remedy. But it is otherwise holden in Eng on the ground that Indebitatus Assumpsit will not lie to compel one to refund money which he recovered by Judgt of Court. But as this does not impeach the Judgt ~~it does~~ he thinks it does not come within the spirit of the rule.

If a surety be compelled to ~~pay money on the obligation on which he was surety~~ satisfy a bond, & has taken no bond of indemnity, he may bring ~~an~~ action of Indebt Assumpsit ~~against the principal~~ against the principal for money laid out & expended at the instance & request of the Deft. 2 Ld 104. 5. Cowp 525. Kirby 139. Root unless a

~~But~~ ~~If a~~ bond of indemnity is given, the surety cannot sue on the ground of a mere liability. In order to entitle him to this action he must have received some special damage.

Cowp 525. 1 Ter 399. 3 Will 14.

When the surety has taken a bond of indemnity, ~~from the debtor~~, he cannot ~~sue~~ bring an action on an action of assumpsit, ~~tho he has paid the debt~~, but must ~~sue on~~ rely upon the bond. For it is a maxim of Law, that when ~~on his action~~ the payment remedy, ~~he cannot~~ must be resorted to ~~resort to a lower one, but must pursue the one of the higher nature~~. 2 Ter 100.

~~Of the Assignment of Leases.~~

It is to be observed in case of assigning Choses in action, that the assignor may in some cases, notwithstanding the assignment, discharge the obligor ~~pay~~ his Chose in action. The distinction is this. If the Chose in action is negotiable, viz. the legal interest in it, the assignor cannot release it in the hands of the assignee; for the assignee can sue in these cases in his own name. But if the equitable interest only is assignable, the assignor may release it, for it can be sued only in his name.

~~If a Lessor after he has assigned the reversion, the lessee~~ assigning the mortgage release the lessee from his covenants, ~~yet the~~ shall the assignee ~~of the reversion, may sue the lessee for the~~ sue the lessee for damages, ~~the assignee of the reversion, may~~ ~~sue the lessee on the~~ covenants ~~that~~ as run with the land, for the ~~legal interest~~ are assignable, ~~as must as the land is~~. 2 Leo 206. 1 Hen 345.

But it has been determined that if a lease has been assigned ~~by a lessee~~, the Lessor may after such assignment release the lessee from all covenants on the part of the lessee provided the release be made before the assignee commences his action. But after the assignee has commenced his action in his own name he has attached to himself a right to prosecute it to Judgment, & the lessee cannot discharge the suit. ~~Lip 308. 6 C. 501. 508.~~ This rule Lord Coke conceives not agreeable to principle; & its contradiction ~~in another case, see Roll Ab. 5 Co 22~~ for the legal interest in the Covenant is assignable. Lip 308. 6 C 503. 2 Rol Ab 411 5 Co 35.

~~A Release of Covenants.~~

~~No general words are used in release, as release~~ of all demands ~~or all demands~~ of whatsoever name or nature, all suits, Quarrels, Controversies &c will not release a ~~sum~~ Covenant before a breach ~~of the covenants~~, for there is no subsisting demand or right of action growing out of the Covenant at the time of executing the release. Bul 166. Co Lit 292. 8 Ji 9 Ga 2 Co. 90. Lat 170.

But a release of all Covenants either before a breach or after will release the ~~covenants~~ Covenantee. ~~from all Covenants, before the breach of the Covenant. For there is no right of action on the Covenant for there is at the time of executing the release, yet there is a subsisting Covenant, or duty. Yet the part of the Covenant there is discharged by this release~~: 8 Ke 510. Dyer 57.

Of Pleading in the action of Covenant broken.

It is a general rule in this ~~Law, that in the action of Covenant broken~~ Caution that the Pltff must state in his declaration that the covenant was by deed; ~~for the Com Law definition of a covenant is that it is an instrument signed & sealed; which on the express delivery of the deed. And in all cases when the Com Law requires a covenant to be in writing, in the pleading such covenant is must be averred to be~~ Sha 514. 6 Ll 517. 6 Ch 108. 209.

~~But in Con the solemnity of a seal adds no validity to a covenant, it is sufficient in an action of covenant broken for the Pltff to aver the covt is in writing, for a writing in Con is as much a covt or deed, without seal as with.~~

It is laid down by ~~Bacon~~ Powell that a covenant may be by parol, but this cannot be strictly true, ~~for~~ if it were it would be unnecessary to aver ~~the covenant~~ it to be in writing. 1 Pow Ca 224.

It was formerly a rule in Law that ~~a Pltff~~ the Pltff in all cases in which ~~he declared upon~~ he declared on a written instrument ~~must produce~~ must produce the deed or bring no ~~Con~~ ~~the said deed &c~~ This ~~proof~~ formerly could not be dispensed with even tho the Pltff could not produce the deed. ~~which would entirely defeat the Pltff in his action, unless upon proof made he could produce the deed or the Deft leaving oyer of it~~ But this ~~rule~~ rule is now ~~in a great measure laid aside, & if~~ & if the ~~Deft~~ Deed is lost ~~either~~ by time or accident or is in the hands of the Deft, the Pltff need not ~~make~~ a proffer of it, but may allege that it is burnt &c ~~But if it is known where the deed is in his possession he must make a proffer of it.~~ 1 Will 16. Salk 1186. 6 Co 38. 3 Ev 151.

~~But in Con as the Deft is entitled to oyer, without a proffer, it is holden, that one is not necessary, tho' it is usual to make it. And in the following [illegible] Pltff its by said writing or Deed as the case may be, ready in Court to be shown, with an fully & at large appear.~~

Whenever a pltff brings an action for a breach of Covt he must assign a breach, for the breach is the gist of the action ~~he cannot else until there is a breach.~~ But in an action on a penal bond it is not necessary. Neither is it lawyer like to assign a breach, ~~of the conditions~~ for there ~~is a proper to be on as the bond~~ is a right of action appears from the declaration, and the condition is ~~a mere~~ matter of defence for the Deft; ~~Whereas~~ whereas in an action on a covenant ~~with assigning it a breach~~ without assigning a breach the Pltff shows no right of action, ~~& if the~~ If the Deft pleads the condition of the bond the Pltff ~~may in his~~ must ~~replication~~ reply a breach of the condition.

It is a general rule that when the covenant is general the assignment of breaches may be general; but when the covenant is special, the assignment must be special. Holts Rep 196. Salk 139.

2 Ra 478. The most general assignments of a breach is in the words of the covnt itself. As when the Deft covenanted he was well seised, ~~and~~ the breach assigned was that he was not well seised. 9. Co 80. 6 Gt 369.

A breach must be so assigned as to appear from the very face of the declaration to be within the covenant, or the Declaration would be bad upon general demurrer. Stiles Rep 5. Cro Jl 340.

If the deed of covenant contains a proviso, ~~depending the covenant on a certain event,~~ the Pltff need not notice the proviso in his declaration, ~~but it is considered as a new matter of Defence & Dep.~~

But if there is an exception contained in the body of the covenant, as a covenant to repair all fences excepting a particular one, the Pltff ~~on an action on such covenant~~ must state and negate such an exception in his declaration, or he must ~~show in his declaration~~ state that the fence not repaired is not the excepted one, otherwise the Deft may plead *non est factum*, or may demur to the evidence. For this exception furnishes a part of the description of the covenant, & without it the covenant would not appear to be the same. 7 Rep 65. Lutw 700. Good Winks. Most of the declaration contains ~~The Pltff in his declaration assigns~~ an inconsistent breach upon a Silicet. That ~~part~~ it can only be taken advantage of ~~mat~~ by ~~without or inconsistent to which~~ a special demurrer ~~rejected as surplusage,~~ and ~~not be considered as part of the assignment. And good thinks the effect demurrer would not reach such defect, tho a special demurrer.~~ Stg 232.

When a covenant is in the alternative, the breach must be stated as to both parts of the Alternative. 1 Leon 250.

But a covenant "to pay or to cause to be paid", ~~a sum of money,~~ is not a covenant ~~subsidiary~~ in the alternative. For to cause to be paid & to pay are the same in Judgment of Law. ~~This fair per alias bar per se; it is sufficient therefore, that the Deft has not paid.~~ 1 Stg. 229.

If the covenant is to pay, ~~money, or to do some other act, or the performance of the~~ on the happening of the two contingencies, it is sufficient ~~to state that the act is not done,~~ to state that one of the contingencies ~~has~~ has happened without stating that it was the one that first happened. ~~It need not be stated that it was the first.~~ 2 Ld Ra 132. A Defendant against an assignee ~~sport~~ upon a covenant that an act shall be done by him or his assigns, ~~the covenant by him, that he or his assigns will do an act~~ ~~shall be a bar~~ ~~If an action is brought against the assignee, the fact must be stated~~ ~~that he is the assignee, &c.~~ that neither he nor his assigns have done it. ~~the act.~~ ~~But if the action be brought against the covenantor, it is sufficient to state, that the covenantor has not done the act, for he is presumed by law to have no assigns. It is therefore for the covenantor to show that his assigns have done the act.~~ Sir 220. Salk 189.

But upon a Covenant to do an act for ~~one, and for his~~ the assigns of the covenantee ~~on an action brought on such covenant against the covenantor~~ it is sufficient ~~for him~~ to state that the act has not been done for the covenantee. The reason given for which is, that the Deft is the only proper person to know whether the act be done or the assigns can not. Coke says that the true reason is ~~because~~ that it is presumption of Law the covenantee has no assignees. 3 Rep 44a. 5 Mod 133. Salk 139.

On a Covenant for the payment of a sum certain ~~there can be no apportionment of the demand, & a breach of covenant assert following the covenant itself,~~ a breach on government of a bond ~~the~~ by words of apportionment is ~~bad~~ bad on Demurrer. 2 Lev 124. 1 Allen 9.

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~~When according to the Nature of the covenant~~ The covenant is to perform ~~some~~ a precedent ~~to his action against the party~~ ~~the Covenant~~, he must aver performance of it. ~~The same rule prevails if the action is brought against a stranger~~. Hob 217. Lsp 304. 7 Co 10a.

An omission to aver performance is an incurable omission because the performance is the substance of the contract.

In mutual & independant covenants, performance is not material. ~~a condition precedent, therefore the Plff need not aver performance~~ Hob 88. 7 Co 11. Cro El 889. Salk 24. Stra 615. 712.

If a covenant is entered into in consideration of mutual promises ~~that the covenant on one side is the consideration of the Covenant on the other side~~, performance need not be stated. ~~The consideration is complete without performance, performance was rewarded in making the covenant. Not the consideration is because the adverse party covenanted. This is a mutual Covenant.~~ Hobart 88.

The same rule applies to contracts & promises & the maxim is mutuendis.

Of the pleadings on the part of the Deft.

If a bond is conditioned that the Deft will permit his wife to be written things to ~~In Covs has often been the case, that the Deft pleaded~~ good ~~A~~ plea that ~~the Plff had~~ he has not broken his covenant ~~but this plea~~ is not good, because it is in the negative. ~~that a negative plea that the Deft has established in Law that a negative plea that the Deft has not broken his covenant is no plea at all~~. 2 Vent 156.

~~When~~ If all the covenants are ~~all~~ in the affirmative ~~it is the Deft~~ The Defendant may generally plead performance, ~~which is a special plea in bar~~. Co Lit 303. b. 5 Com 89. 4 Mod 91. Lsp. 305. ~~But the~~ ~~is not true in its full extent, but~~ This rule must be confined to cases in which the things covenanted about are indefinite either in kind, number or some other respect, ~~& cannot be made out~~ as the case in a covenant ~~Conformably to a well established rule. Eg. if a Sheriff covenant~~ by a sheriff to return all writs, ~~they need not in their covenant, & plead a~~ ~~performance, is a sufficient plea, for it cannot be expected that he should specially plead concerning every writ he has ever approved~~. 5 Com 236. Show Pleas Com G. 4 Mod 1.

~~When a Deft has~~ If a covenant is to be a number covenanted affirmatively ~~to do a number~~ ~~of specific acts, he must plead specially performance of the~~ ~~a special plea of~~ ~~in multiplicity~~ ~~as to pay the legacies in a will; & ~~special plea of performance~~ ~~Conveyance therein ~~to pay all legacies was a good plea for general performance~~ ~~performance must be pleaded~~ — ~~If the covenant was to deliver~~ ~~all lands which the was possessed of on the day of the covenant~~ at a certain time, a special plea of performance in this plea ~~a special plea of performance must be pleaded~~ Cro J. 356. Cro El 749. Salk 498. 1 Lev 303. 1 Lid 215. Cro El 916. 1 Ven 753.

If some of the covenants are affirmative & some negative a plea of gen. performance will not answer; but the Deft must plead specially that he has not done the acts which he covenanted not to do; ~~and as to the affirmative the above distinction applies~~ Cro El 691. 5 Com 236. Co Lit 303. b

If all the covenants ~~contained in a deed~~ are negative, the Deft must plead specially that he has not done what he covenanted not to do.

If however ~~when some of the covenants contained in the deed are affirmative & some negative~~ the Deft should plead ~~general~~ performance generally to a deed containing affirmative & negative covenants advantage can only be taken of it by general Demurrer. Co Ll 232. 5 Com 82.

When a deed contains both affirmative & negative covenants & the negative covenants are void, ~~in pleading~~ the Deft may treat them ~~negative covenants~~ as tho' they did not exist & plead performance of the others according to the above rules, ~~to the negative covenants~~. Holt 13. 1 Mod 256. 5 Com 83. 236.

When the covenants in a deed are in the disjunctive, the Deft must ~~they~~ show which of the several acts he has performed, & ~~and~~ if he neglects doing this advantage may be taken of it upon a general Demurrer. Co Lit 303. 8 Co 133. 1 Leon 311. 5 Com 82. 84. Bacon says a plea of general performance is ill on special Demurrer. 4 Bac 91.

~~When~~ Upon a covenant to do what is called a matter of Law, the Deft must plead performance specially, also Quo modo. A matter of Law is a covenant to execute a discharge, a bond, a Deed &c. the sufficiency of which is to be adjudged of by the court. ~~But when~~ the Deft is not obliged to plead Quo modo. If the ~~Plff~~ Plff would be necessitated to join issue ~~the question is~~ what would claim the ~~must go~~ to the Jury ~~to be determined, which would be~~ contrary to the established rules. 9 Co 25. Hobt 97. 107. Dyer 229.

If a person covenants to do any act which ~~act~~ must appear as of record, as to levy a fine, or suffer a recovery, the Deft must plead performance specially Quo modo, because it is a matter to be decided of by the Court from the inspection of the record itself; for every record must be tried by itself. Co J. 560. 4 Bac 92.

In an action brought on a covenant or bond to save harmless the Deft in some cases is allowed to plead generally, non damnificatus ~~estus~~. In other cases he must plead specially that he has saved the Deft harmless Quo modo. ~~The act of indemnification~~ If the covenant is to save the Plff harmless from any particular thing ascertained in the instrument, the Deft must plead specially ~~also Quo modo~~. Cart 374. Co Ll 433. 5 Mod 244. 5 Com 236.

~~or see the Plff of or from such a bond, is not a action or from any other particular Plff harmless in general from things unascertained in the instrument~~ If the covenant is to ~~save the~~ discharge, defend, or see the Plff of or from such a bond, is not a action or from any other particular thing ascertained in the instrument ~~the instrument~~, the Deft must plead specially with Quo modo. ~~Provided the Deft covenanted to save the Plff harmless by any specific act. Because general pleading is never allowed except to save pleading to pleading.~~

If the covenant is to free or to discharge, or indemnify the Plff from any damage or loss or trouble which shall happen by reason of a bond, not a action, ~~the Plff harmless from all costs, damages, expences &c. which may happen by reason of the bond~~ a general negative plea is sufficient, because it does not appear that any thing has happened ~~Quo modo. Cart 375. to prejudice the Deft. Generally Specially~~ to the Plff, & consequently it is impossible for the Deft to show that no damage has happened. Cart ~~Here Cart. 374. adjudged by counsel to be a release~~

If a covenant or bond is given to save the ~~Deft~~ Plff harmless in general terms, & no particular mode is prescribed of saving him harmless; non ~~damnificatus~~ damnificatus is a good plea. Because he is indemnified, if the Deft has in any manner saved him harmless. Co Ll 916. 3 Mod 232. 5 Mod 244.

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If however he pleads specially affirmatively, he must show Eno Modo. 2 Coke 304. a 304. Cro Jac 363. Cro El 916.

If the covenantor is sued on a covenant for an act to be done by a stranger, he must plead Performance specially. This Court thinks ought to be taken with the distinction, that if the act is specific a special plea is requisite; if the act be indefinite, General performance is a sufficient plea. Cro Jac 559. 1 Show 1. Yelv 305. 5 Com Dig

If on a covenant or bond to save harmless, the Deft pleads non damnificatus, it is not sufficient for the Plff in his replication to state that he has not saved him harmless, but he must state specially wherein he has been damnified. 1 Lev 83. 1 Sid 424. 4 Bac

A covenant in one deed cannot be pleaded in bar to an action brought on a covenant in another deed, unless the former be in the nature of a defeasance, ~~in which appears or a release in the former covenant~~. 2 Ventr 217. Yelv 305

~~A defeasance in a separate deed may be pleaded in bar, it must however~~ It must however be intended as a defeasance, and contain words of defeasance. It comes in must refer to the deed on which the action is brought. Cro Jac 500. 575. 1 Salk 573. 3 Salk 298. Cro Jac 426.

One covenant may be pleaded in bar to another action on another covenant ~~founded~~ on the same deed, & it is not necessary that ~~the covenant~~ it should contain words of defeasance, for the sense of parties must be collected from the whole deed, ~~& not from any detached part~~. 1 Lev 152. Yelv 306.

~~The following are cases where there are two or more covenantors or two or more covenantees.~~

If three or more persons covenant jointly & severally, all or any may be sued, ~~or one only~~ ~~But no number less than all or more than one of them can be sued~~ The contract must be treated as altogether joint or altogether several; for there is no such ~~thing~~ practice as considering a contract as part joint, and part several. Yelv 26. Sid 238. 7 Ter 702.

This rule applies to all descriptions of contracts.

But if ~~Where or~~ two or more persons enter into a contract jointly ~~and not severally~~, all must be included in the action. Salk 393. 2 Vern 99. 3 Atk 697.

If there are two or more ~~joint obligees or covenantees~~ obligees or covenantors, they must all join in the ~~suit~~ action, provided the covenant or obligation be made with them jointly, otherwise ~~only~~ the obligee or covenantor might be subjected to a multiplicity of suits for the same cause of action. ~~or there are obligees or covenantees~~ 2 Ter 282. 2 Str 1146. 5 Co 18.

If all the obligees do not join in the action, the Deft or obligor ~~in Eqy~~ may demur to the declaration. This rule Court thinks is wrong, & is not established in ~~Eqy~~ Eqy.

In some cases where one covenants with two, or more covenantees jointly & severally, they may one of them sue alone, & in other cases all must join. The rule of discrimination is; If the interest of the obligees, appears to be several, each may sue for himself; but otherwise they must join. For example. If J.S. grants white acre to A, & black acre to B, in the same deed, yet their interests are clearly distinct, and they may consequently sue alone. But if J.S. should grant white acre

to A & B; then interest wants be joint, & they ought consequently to join in the action. 5 Co 7. 8. 18. 19. Jenkins 262. 3 Bac 695. 1 Wms 532. 5 Co 18.b

From the above rule it follows that co-obligees cannot have several rights of action for the same cause. Yet co-obligors may bind themselves severally for the same cause. 5 Co 19.a

A grant to two of the same thing jointly & severally is a joint, & not a joint & several grant. 5 Co 19.a

If two covenant jointly & severally, ~~each~~ either may be sued ~~alone~~ for the neglect of the other. And this, ~~altho' the person against whom the action is brought, was not jointly & severally bound~~. Sty 553.

When two or more are jointly & severally bound, a recovery against one, is no bar to an action ~~brought against the same Ct~~ against the other. And tho' the body of one is ~~taken~~ charged in execution, still the other ~~may be sued, & proceeded against~~ may be sued. There can however be but one satisfaction obtained. 4 Mac 116.

This rule does not apply to Torts. 6 Gi 73. 74.

If there are several who are bound jointly & severally, & one of them is made an Executor, at Law the obligation is completely released as to all. Because the right & duty, & the remedy concur in the same person. — An Ex is called an officer in law, & if there is more than one yet they all make but one officer, and to all intents their rights are joint; and if one obligee is discharged the others of consequence are; For each was bound for the whole sum. Salk 300. Co Lit 264.b 8 Co 136.

Also in Chancery if one of two or more obligors is made an Ex the whole are discharged as against the representatives of the testator. But with respect to his creditors or legatees, the obligors (provided there are not assets sufficient) are bound to discharge the debts or legacies. Talb Cas 240. 2 Bac 311. Yelv 160. 2 Powell Co 244 a 254. 255. 9 Mod 62. 10 Mod 515.

If a covenant recite that A, B & C on one part, & that D, E & F, on the other part &c but C did not actually execute the covenant, D, E & F may sue A & B alone, provided they aver that C did not actually execute the covenant. And the rule holds & converso. 2 Sty 1146. 2 Ld 37. 1 Wms 323.

If it is intended that the parties be bound jointly & severally, it is usual to express it in the instrument in so many words. But it sometimes happens that instruments are drawn in this form "& we agree so & so" Yelv apprehends this to be a joint contract of course, unless something be said in the instrument from which it may be inferred that the parties intended it joint & several. 3 Bac 697. 1 Hen Blk 296.

The Action of account is founded on contract either express, or implied, that one who receives property of another to account for will render his reasonable account; and if the person this contracting refuses to render his reasonable account this action lies. The Action of Account

1) It is enacted in the state of New York, that actions of account shall & may be brought & maintained by & against executors or administrators in all cases in which the same rights have been maintained by & against their respective testators or intestates. Laws of 1837 536

Action of Accompt.

The action of accompt is founded upon a contract either express or implied. That one who receives property ~~of another to account for~~ will under ~~his~~ an accompt. ~~and the person accompting refuses to render his reasonable accompt, the action lies~~

~~The action of accompt at~~ It lay at Com Law only against ~~only~~ three descriptions of persons. viz. 1st Guardians in Soccage. 2nd Bailiffs. 3rd Receivers. It is said by Bacon that it ~~may~~ will lie in favour of a ~~for a Merchant against another~~ Joint Merchant against his partner. But ~~the Joint Merchant~~ in this case ~~is an~~ is the partner as receiver. ~~He is considered~~ Co Lit 172.a 90.b 1 Bac 16. 2 Rolle 117. 161. 1 Com 515.

By the Stat of 4th Ann the action of accompt is extended to Joint Tenants, & Tenants in Com. ~~and in these cases~~ The ~~Coterenant~~ Co-tenant ~~who~~ is sued ~~in such~~ not as receiver but as ~~bailiff~~ Bailiff. 1 Bac 17. Co Lit 172.a — This stat is adopted in New York.

It was a matter of necessity that this action should be extended to Joint Tenants & Tenants in Common, for by the Com Law they had no remedy as they were debarred from prosecuting each other by any other action.

At Com Law ~~the action of accompt~~ it was allowed only between ~~the~~ the original parties ~~thereunto~~, because it was supposed to be founded on such a privity of contract as could be known only to the parties themselves. 1 Com Dig. G. Co Lit 89. 90. Fitz N.B. 117.

To this general rule ~~above laid down~~ there is an exception ~~The action may be sustained~~ in favour of an ~~an~~ Ex.r of a Joint Merch.t ~~against his partner~~ ~~The reason of this exception~~ is said to be for the ~~support of~~ encouragement of Com merce. But ~~the action could~~ it can not be brought against the Ex.r of a Joint Merchant. Co Lit 90.b 2 Inst 104. 1 Bac 17. Fitz N.B. 117. —

By three ancient Stat (viz) the Stat of Westminster 2. 13 Edw 1 & 25 & 31 Ed 3rd ~~the action of accompt was extended~~ the Ex.r & Ad.r of the Ex.r of a Joint Merch.t were allowed to maintain the action of account. ~~in favour of Executors & the Ex.r of them~~ ~~also in favour of Ad.rs. That Writs of these Stats extended to the action against Ex.rs Ad.rs who were not liable at Com Law~~ Co Lit 89.b 1 Bac 17.

~~Thus~~ The Stat of 4th Ann ~~extended the action against~~ subjects the representatives of Guardian in Soccage, Bailiffs, Receivers, and ~~also in favour of Executors~~ the Representatives of Joint Tenants & Tenants in Com. 3 Blk 164. 1 Bac 17. (1) It also authorized Joint Tenants & Tenants to commence it.

A bailiff is a person who ~~has~~ received property ~~of another to use~~ for the use of another & who is to be answerable for his profits ~~to account for the same, & be paid for his charges & expences in so doing~~ Co Lit 172.a

A Bailiff is bound to account for the profits he might have made by care & industry. Co Lit 172.a

A receiver is one who has received money for the use of another, ~~to render an accompt for~~ and who has no allowance for his care & trouble. Co Lit 172.a

To this rule ~~there is an exception for a~~ Joint Merchants ~~and~~ for an exception ~~for~~ if a merchant is sued ~~by his~~ as his receiver, he is entitled to a deduction for his services; ~~his partner as a receiver, he is entitled to an allowance for his trouble & care~~ ~~and~~ he is entitled to the profits ~~he might have made of the~~ but is liable for the profits that he might have received by proper attention ~~exceeding his partner had in proportion~~. Co Lit 172.a 1 Bac 19.

A Bailiff ~~cannot~~ in an action of account, cannot be charged as a receiver, ~~for he is the action cannot be maintained~~. Co Lit 172. 2 Wilk A 109 & 116.

~~A~~ Stat. in Connecticut provides that the action of Accompt can be sustained against Joint Tenants, Tenants in Common, Coparceners & their representatives, ~~either that it may be sustained in their persons. If death happens either~~ by the hand who are residuary legatees, ~~may have this action~~ against their Executors ~~also that~~ Residuary legatees ~~may sustain it~~ against Executors.

Whether this action will lie in the State of Connect. against B. & Co Bailiffs, or In & Co of Receivers may be a question. Nothing is mentioned concerning them in the Stat. It is not a practice supported by the Common Law, for, as has been before observed, they are not liable till the Stat. of Anne.

The action of account being founded ~~upon~~ on the principle of contract, does not lie for torts, excepting in cases ~~where a person~~ of taking the goods of the King & ~~The King may then sue in an action of account in the Exchequer Chamber~~ of ~~Orphans~~ the goods of infants, ~~both in Leg & Eq, where a wrongdoer takes their goods, he may be sued in an action of Accompt. This is allowed on the ground that presumed disability to prosecute an adequate remedy~~. 1 Co. 89. 1 Vern 436. 1 Atk 489. 2 Vern 295. 342. Fitz N B 118. Co Lit 89. Cro Car 229.

It is said that ~~an action of account~~ accompt will not lie against a person who has received a sum certain, ~~& refused to deliver it to the plaintiff, or to pay it to the plaintiff's use, or to deal with it as the plaintiff directed, he shall not have the action of accompt for the £100. to deal with for the £100.~~ but for the profits arising out of that money. This action lies. Lord thinks that this rule if taken as the terms seem to import is not law. Certainly it is not agreeable to the practice in Eqy. 1 Roll 19. 1 Com 87.

It is laid down in Hobart that the action of accompt ~~would lie~~ will lie against a Sheriff who ~~had~~ received a sum ~~been a proper Action~~ certain for the Plff. This ~~Hobart~~ appears contradictory to the term ~~of the rule above laid down if that be taken or the term of the rule~~ Hobt 206.

It is also laid down in Co Lit & elsewhere, that ~~an receiver~~ ~~money for another, to render an account for~~ the action of account ~~will lie~~ ~~money for another~~ of account lies against the person who has received money for another to render an account for. 2 Rol 101. Co Lit 172. Fitz N.B. 116. 1 Com 87.

Lord apprehends that the meaning of this ~~general~~ ~~rule~~ ~~is that~~ that for a sum certain received ~~by one person to pay~~ paid over, the action of account will not lie as bailiff. This there is a rule ~~so~~ laid down in 1 Comm 87.

~~The general rule laid down by Bacon appears to be without foundation from the following rule, viz,~~ Bacon ~~If a sum is delivered to another to be redelivered on a certain occasion, or event, ~~viz~~ ~~is not delivered~~, the action of accompt will lie. 1 Com 87. — Fitz N. B. 116. 118. 1 Rolle 116.

In Com it has been determined that ~~a sum certain~~ the action of Accounts will lie for a sum certain. Kirby 163.

If money is received of A, to the use of B to account, the action of account lies in favour of B. But ~~also~~ if one delivers money to A to be delivered to B for the use of the owner, the action will not lie in favour of B, because there is not a ~~sufficient~~ privity of Interest.

These two rules appear inconsistent, & both cannot be law. Co Lit 172. Fitz N.B. 118. 1 Com 85. 89. 1 Rolle 118.

If a Bailee of goods waste them, or refuse to deliver them up, ~~the action of~~ Accompt is ~~not~~ the proper action ~~to be sued for them~~ 1 Rolle Ab 116. 1 Bac 8. Trover and not Accompt is the proper action against a Bailiff. ~~The action of accompt will not lie against a Bailiff for the rents & profits of the land, but Trespass is the proper action~~ 3 Leon 24. 1 Com 89.

If a bailiff ~~out of~~ make a Deputy ~~to act for himself, the Deputy~~ the owner of the property, not can put an end to the Deputy is not the bailiff ~~and neither shall he shelter the Deputy~~ action of accompt against him ~~Accompt against him~~. Fitz H. N. B. 119. 1 Rolle 118. 1 Com 87.

An Infant is not liable to an action of Accompt because that action is founded on a privity of contract, & an infant is unable to make such a contract. 1 Rolle 117. Co Lit 172. Fitz N. B 118.

If he who receives property of another to account, promises ~~to pay~~ to account for them, ~~the~~ either the action of Accompt, or Assumpsit will ~~either lie~~ lie against him. 1 Salk 9. Carth 89. Esp 96. 7.

It is said by Holt that if the Plff elects to bring the action of Assumpsit, he shall not be allowed to travel into the items, but shall confine himself to the special damage he has sustained by the Deft's not accounting. Carth 89. Esp 91 & 9.

Lord Coke doubts whether this opinion of Holt's is law, ~~for in making the question to appear to be accepted by Spice & Devonsway of his own opinion.~~ The point in the case which was decided, ~~was, that~~ the actions of Accompt & Assumpsit on an express promise ~~are~~ were synonimous. But if Holt's opinion is law, then ~~they~~ not synonimous. Besides if the Plff in an action of Assumpsit is not allowed to travel into the items of the ~~Accompt~~ account, it will tend to that multiplication of suits which the law abhors. Indeed it is the general practice to try & travel into the items of the Account in the action of Assumpsit. 1 Bac 20.

Lord Coke apprehends that an implied promise is sufficient to entitle ~~the~~ Plff to an action of Accompt, or Assumpsit. For there is no difference between express & implied promises; implied promises being as binding as express. If this rule is true, the actions of Accompt, & Assumpsit are concurrent in almost every instance; and indeed experience proves them to be convenient. For in fact the action of Accompt is almost entirely disused. 1 Bac 20.

If one by deed acknowledges that he has received property of another for Accompt ~~for to the obligee~~ the obligee has his election either to bring the action of Accompt, or action on the Deed. This rule may at first appear ~~to be~~ to be ingenuous to the maxim that when one has a given remedy he cannot resort to a lower one for the same thing ~~the same thing~~. ~~But it ought to be remarked that~~ these actions are not brought for the same thing: For altho an action is brought on the Deed, yet it does not merge the parole contract at all, but disclosesit. 1 Rolle 118. Dyer 20. Co 62 b.

If one person finds the property of another, the action of Accompt will not lie. For there subsists no such ~~privity of contract~~ privity of contract in this case as is necessary to support the action.

The declaration in an Action of Accompt states, that at such a time the Deft became the Bailiff or receiver of the Plff, & received ~~such~~ the property in question ~~such property~~ to his use ~~his accounts~~ accounts, ~~but that he~~ that he refuses to deliver the same ~~property~~. And the Plff demands

his reasonable attempt, damages & costs. After stating his damages, the ground & gist of the action is that the Deft has received property to account for which property he refuses to account.

If the action is brought by one partner, joint tenant, or copartner against another, it is not only necessary to state that he was charged as bailiff &c, but must also state in what relation he stood to the Pltff, & that the Deft has taken more than his reasonable part, and refuses to render his account. If the Pltff prevails in this action, then as always upon Judgements. ~~It is that the Deft be made to account.~~ In the first place the Deft is to account. 1 Auditors are then appointed whose business it is to take, examine & find what is due. ~~in their accounts~~ 1 Wills 99. 1 Com 97. 95. 1 Mod 42. 1 Bac 21.

The persons appointed as auditors are to give notice to the parties as to what time & place they meet, & on hearing the merits, they make what is sometimes called their report, award, or verdict; which is returned to the Court from whence their commission issued, & if it is accepted final Judgement issues. ~~in favour of the party for whom the award is; & then expense accrues~~ a bill of costs. 5 Com 95.

It is stat in Com ~~awards~~ enacts that the Court award to the Auditors reasonable costs, to be paid to them by the party who receives; but who may put it into his bill of costs, & thereupon finally recover it from the adverse party. ~~5 Com 97.~~

Before the Auditors the parties of common right are allowed to testify. But they are not allowed this privilege before it goes to the Auditors. — By a stat in this State the parties may be compelled to testify, & if they will not the auditors have power to compel them by imprisonment. 5 Com 86.

In Eq if the ~~parties~~ Pltff brings his bill in Chy the parties may be compelled to testify.

If the Deft refuses to appear & exhibit his account, Auditors may render Judgment for the whole sum claimed in the Pltff declaration. ~~This practice prevails both in Law & Eq~~ 1 Com. 95. 6 El 806. 2 Will 117. 5 Com 86.

One stat provides that if the Auditors found a balance in favour of the Deft, they may award it as damages, & the Court will decree for the Deft to recover the damages & his costs. This is not the practice in Eq unless on a petition in Chy. 1 Bac 16.

~~The Pleadings of the Deft~~ as to

There is a contrariety of opinion ~~concerning~~ what may & what may not be plead in bar to the action of account. 3 Will 313.

~~This general rule is~~ The Deft may plead ~~to the action~~ any thing which goes to show that he is not bound to account. ~~This also a good bar to the action if the Deft plead~~ that he was not Bailiff, or receiver in manner & form &c. Indeed this is the general issue. 1 Roll A 122. 1 Com 91. 1 Bac 20.

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That the Plff has released the Deft from

~~It is competent to plead in bar a release of~~ all actions ~~given by the Plff~~. 4 Bac 85. 1 Roll 123.

~~An~~ Award of arbitrators that the Deft be acquitted, or that the Plfs release him. ~~is a bar to the action of accompt.~~ Cro Eliz 82. 4 Bac 85.

~~The plea ought to show that the Deft is not bound to acc.~~

~~It is competent to plead~~ That the Deft received the money to deliver over, & that he has delivered it over. 1 Com 91. 94. 1 Roll 122. 126. Cro El 830. 3 Will 115. Gould thinks the above rule is questionable. Because no plea is a bar which admits the Deft has been once liable to accompt, which does not amount to a release, is a good plea. This rule is well established & appears to be incontrovertible to the above. Besides it is agreed that a plea that the Deft before the action brought has paid over the money, is not a good plea. Nor can it make any difference in principle whether the money has been paid to the Plff, or to a third person. If one is a good plea the other is on principle. 1 Roll 123. 124. 1 Bac 20.

A plea that the Plff has given the Deft a receipt is not a good plea in bar; because a receipt is nothing more than evidence of payment; and payment itself is not a good plea. The books say a release of the money is not a good plea. This Gould doubts. Dyer 22. 4 Bac 85. Co 7.

A plea that the Deft has fully accounted before the action is brought, is a good plea, because he cannot be made liable to account if he has accounted fully; in such case however the Deft must confine himself to the proof of his having fully accounted, & cannot travel into the items of the accounts. 1 Com 91. 3 Will 113.

~~This is a general rule that if the Deft shew by his~~ A plea that he has been obliged to account, it is no bar, but that he has fully accounted, or a release, is a good bar. 1 Com 91. 3 Will 73. By the rule is that if the Deft plead a release, or that he has fully accounted, he must plead it specially; because according to the strict rules of pleading, the introduction of proof that he had fully accounted would negative the plea that he never was bailiff. ~~The Stat Com provides all offences must be given in evidence under the general issue, except a release, or other offences in the nature of release.~~ 3 Will 113-114.

It is not usual to plead before auditors, but there may be pleadings & the parties may join issue, the issue however cannot be tried by the Auditors, but is sent back to the Court for trial. 1 Com 93. 3 Will 99. Cro El 84. 806 1 Bac 21. If issue is joined before the auditors, they must remit it to the Court to be tried, and if the issue is found for the Plff, he recovers the whole sum in damages & costs. If for the Deft he recovers his costs, & this issue is final, else, there might never be a determination. For if it was allowed to be again sent to auditors to decide the merits, the parties might again join issue, & thus prevent judgment. 3 Will 117.

What ever can be pleaded in bar to the action must be so pleaded, & not before the Auditors. This rule is established to avoid trouble & expence to the parties, and it is also agreeable to a general rule of pleading. Stiles 411. 1 Com 93. 3 Will 73. 16 Mass 101. 113.

Nothing can be pleaded before Auditors in this action ~~except that it is agreeable to~~ but what can be found on the Gen issue before the court. 3 Will 114.

A plea that the Deft was never bailiff cannot therefore be given in before the Auditors; because such a plea would contradict the former Judgment ~~before~~ the court. 3 Will 13. Co Lit 82.

It is always competent to show before the auditors any thing which could not be produced, as shown in the plea of bar; but which shows eventually that the Deft ought not to be liable. — The Deft may show before Auditors that the Ship was lost in a tempest, or that he cast the goods overboard to save the Ship, or that they were taken by robbers or public enemies without his fault. Co Lit 89. 1 Com 93. 1 Roll 124. 1 Bac 21.

There is however one case reported where goods taken by the public enemies was decided to be a good plea to the action. Sty 680.

If a bailiff pleads that the property was perishable and in danger of being lost & therefore he sold it on credit, which credit was not good, it is not a good plea, for a factor or agent has no right to sell property on trust, without a special commission. 2 Mod 100. 1 Bac 21.

It is good accounting for the Deft before auditors to plead all losses occasioned by robbery, Public enemies, or Acts of God happening without any fault of his. Co Lit 89. 1 Com 94.

In Con the action of account may be brought before a single minister of the law; he has not however power to appoint auditors, but must take the account himself. He first rendes judgment that the Deft accounts, & then takes the accounts himself & rendes final judgment.

By Stat of Con in actions of Book debt the court may appoint auditors when the demand is more than seventeen dollars, in the same manner as in the action of account. St Con 37.

A single minister of the law cannot appoint auditors in an action of book debt; for their jurisdiction extends no further than to trials not over fifteen Dollars. St Con 37.

The Stat also provides that on an award of Auditors, there shall be no ~~higher~~ appeal to a higher court. St Con 37.

The general practice now of settling accounts in Eng. is, to file a bill in Ch, & the Common Law action is now almost entirely gone out of use, because it was not sufficiently remedial, as the parties were not obliged to testify, neither to produce in Court their books or papers. But in Chancery they are. 3 Bac 437. 381. 382. 449. 1 Bac 16.

Our Stat virtually gives to auditors all the powers of a Court of Ch. in Eng.

If on making up the award report either party thinks himself aggrieved, or injured, he may apply to be relieved. But in what manner relief is obtained, is not mentioned in the books. 1 Bac 21.

The Action of Account is frequently used in Con; and objections to awards are made by way of remonstrance in writing against the Acceptance, & which contains the facts on which the objections are founded. An Award is a thing divisible, & part of the Award may be objected to as bad, whilst the other part remains good. & the party often suffers a remittur to be entered on record, & then the award stands good.

It is a general rule with our courts that they will not inquire into the facts on which an award is
But if there is a mistake in Law, on which the award is founded, it may be proved be inquiry of the Auditors themselves, but not by the intervention of the Jurors. Kirby 353. Root 137. 261. 268.

The award will be set aside in Con if the Auditors have exceeded their commission.

If the auditors have made a mistake of any kind on their own principles, the Court will set aside the award, this must be proved by the Auditors themselves. Root 268. 413.

Action of Assumpsit.

The Common law knows of no such action as Assumpsit; It ~~is an action~~ was created by the St Westminster, to provide a remedy for those injuries ~~in~~ which ~~the~~ common law was deficient. ~~Trial action on the case.~~

~~This action is now more commonly used than any other.~~ It is divided into two kinds. 1st Express, sometimes called Special Assumpsit. 2d Implied, or Indebitatus Assumpsit.

~~In express~~ Special Assumpsit is when one engages to do a thing ~~expressly~~ upon a special agreement either in writing or by parole. ~~what agreement can be proved by his own affirmations, made at the time of the agreement; and it is not material whether it is by parole, or in writing, & in some cases it is absolutely necessary that it be in writing.~~

~~In~~ In an express Assumpsit the ground of the action is the agreement, and it is a general rule that the intent of the parties gathered from the agreement, is the rule of damages.

Indebitatus Assumpsit lies when the law raises a promise, altho ~~there~~ none was any express one made. ~~The law supposing it to be his duty to perform the act.~~ ~~Therefore the foundation of this action is, that it is just & right that the act should be performed.~~ The rule of damages is Quantum valebat or the Quantum meruit of the thing contested. ~~If~~ For instance a ~~Bag~~ man loans money, Indebitatus Assumpsit lies to recover it and the interest. ~~In this case recovery is had upon the ground of an implied promise.~~ But there are cases in which no promise can be implied, but in which this action ~~and the Indebitatus~~ will lie upon the ground that it was the parties duty to do the thing required. ~~In this class of cases the~~ The action to recover money found in the Courts, ~~belongs, & the recovery~~ or for money paid under a mistake, are of this description.

It is a general rule that ~~whenever~~ a person is under any a moral obligation to pay money, ~~altho he has been exempted~~ ~~prevented by law~~ Indebitatus Assumpsit will lie to recover it. There are some exceptions to this rule upon principles of public policy, as usage is in Gambling Debts, ~~& where~~ Debts barred by the Stat of limitations. ~~has been against the Debt.~~ (1)

In an Action of Indebitatus Assumpsit the plaintiff recovers what it is equitable, just & right he should recover. In this action a set off is allowed, for whatever expenses the Defd has been at. ~~The~~ Action for expend Indebitatus Assumpsits are ~~actions brought~~ sometimes concurrent with each other, & sometimes with other actions. ~~and the rule is~~ 3 Y. If there is an express agreement to pay a sum certain, at a certain time, ~~the~~ Such action in co. assumpsit ~~action of express assumpsit will be founded upon the agreement,~~ ~~also~~ Indebitatus ~~assumpsit may be brought stating the indebtedness, and giving the promise evidence~~. In this case the Action of Debt might also be sustained. ~~altho it is now almost fallen out of use.~~ In this case ~~each of the above cases~~ the ~~action~~ rule of damages is the same in both forms of actions. 2 Bro. 1015 ~~the interest only can be recovered, that is the value of the thing at the time it became due.~~ 2 B. ~~So it is in the power of the court to lessen the damages assessed by the parties, except when the agreement is in the nature of a penalty, for in this case a penalty may always equitably be reduced to the simple sum due.~~ 2 Bro. 1005.

If when a person entered into an agreement to do or pay something, & it manifestly appears that he was entrapped, or that undue advantage was taken of him, altho he received something valuable, still courts will order the Jury to lessen the damages. As was done in this case where a man engaged another to bring him one barley corn the first week, two the second & so on to the end of the year, in Arithmetical progression; in consideration of which he gave him five pounds.

Judge Reeve conceives that the best way of moulding in these cases would be to consider them as tainted with fraud, and wholly set them aside. For the minds of the parties certainly never met.

When there is an express promise to do any a collateral act, as to go to Hartford, ~~the action of express assumpsit~~ alone ~~will~~ lies.

When ~~a bride of a boy~~ there is no contract whatever ~~is included~~, ~~no action lies~~ Indebitatus Assumpsit only lies. As for ~~finding~~ money, or ~~paying~~ money paid thro' mistake, or for ~~income~~ money obtained thro' fraud or violence.

When there is an ~~express assumpsit~~ agreement to perform a contract ~~something, for the proof~~ for which the party is already paid, an express ~~assumpsit~~ will lie to recover ~~the~~ damages for non performance, but Indebitatus Assumpsit ~~may be brought~~ to recover the consideration money. ~~which has been paid, considering it as no contract, in as money had & received for the Plff's own use.~~ 1 Bro. 456.

457.

(1) ~~The~~ P. Manwaring says that — This is an action for money had & received to the Plaintiffs use & Mot. The Plaintiff can recover no more than he in equity & conscience is entitled to; which can be no more than what remains after deducting all just allowances wh. the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross demand or mutual debt: it is a charge which makes the sum of money received for the Plffs use so much the less. — In the case then in question the action was ~~This was an action~~ against a Ship Broker for the proceeds of property delivered to him to sell; the claim which he wished to deduct was for commission. Dale vs Collet 4 Bur 2133.

But in a Count for money had & rec.d the Plaintiff cannot recover interest. Walker vs Constable. 1 Bos & Pull 306

In the case of Moses & Mc Farlan Lord Mansfield said that when money was paid for the transfer of stock & the person receiving it failed to make the transfer, that in an action for money had & rec.d & proven the money p.d ~~you~~ without proving the value of the stock at the time it should have been transferred it will be recovered. But this point does not appear to be concerned with. It is laid down that if the stock had risen no more than the money paid could be recovered because this for an action does not admit the recovery of damages. But in the case of Moses & Mc Farlan they allowed no more than the value of the stock to be recovered upon the ground that that was all the damage sustained. Why decide as if the question of damage is irrelevant, & why allow the Deft to look to damages when for his advantage & not the Plff.

(1) It was held that when the Defendant received money in consequence of an usurpation of an Office, that Indebitatus Assumpsit lay; altho' the transaction was a tort. Sr Th. Jones 127. 8

It was also held that the assignees of might bring either trespass or trover for a conversion subsequent to an act of Bankruptcy. 2 Str 144

It was noted that you might waive the Tort which would support trover & bring Indebitatus Assumpsit. 2 W Bla 827 Hitchin vs Campbell.

When a man pays money on a mistake in an account, or when one pays money under or by a mere deceit, he may bring Indebitatus Assumpsit for the money. Bull N P 131.

But an action for money had & received does not lie to recover back money paid for the release of cattle damage feasant, tho' the distress were wrongful. — Lord Mansfield distinguished the above cases from this.

He said that there is a material distinction between this & the instances alluded to at the bar, where the Plff is allowed to waive the Trespass, & bring the action for money had & received. In those instances, the relief is more favourable to the defendant. He is liable only to refund what he has actually rec.d contrary to conscience & equity. In this, infinite mischiefs, in taking or treating the distress, would avoid the distress tho' the defendant had a right to distrain. But, which is more material in those instances, the Plff by electing this mode of action, takes the benefit of special pleading, and takes the chance of being surprised upon himself. In this he eases himself of the difficulty & precision of special pleading, & the burthen of the proof consequent thereupon: & exposes the Deft to uncertainty and surprise. Cowper 414 Lindon vs Hooper.

A pays B £200 to transfer him £150. of Bank Stock at some future time, B neglects to transfer the Stock at the time agreed on, A can sue B, on the express promise, in an Action of express Assumpsit, or he may sue him in indebitatus Assumpsit, for money had & received. By the law of Eng, it is not material whether in the above case the contract is, or is not in writing. — In Eq. Courts have compelled the parties to resort to their written agreement. This is a just principle when the action is express Assumpsit, brought on the agreement. But on principle it must be immaterial when the action is brought on the ground, that there is no contract. But it is otherwise determined. See 4 T. 207.

~~The action of~~ Indebitatus Assumpsit is sometimes concurrent with ~~the action of~~ Trespass and Trover. (1) ~~In~~ The Party may waive all hold on the wrongdoer for being dishonest, and sue him as tho he had been his agent, for money had & received to his use. —

Neither is there any objection to its being concurrent with the action ~~for~~ Trand if the pleadings clear. Yet there is the advantage to be gained by bringing an action of Indebitatus Assumpsit instead of one for fraud. Eg — Selling bills of Exchange which are worth nothing; if the price of them was something which was capable of being identified, the action of Trover could be maintained, and the Party injured might recover ~~his loss whereas he fraud bar~~ it in an action of Trover.

(1) By parole contracts spoken of above, are meant contracts described at length, as contra distinguished from Notes of hand, where the consideration is not detailed, & the remedy in by stands upon different grounds.

If a declaration ~~purports to~~ details a contract at length, ~~the~~ the Proof must correspond precisely with it. ~~exactly as it is laid in the~~ ~~the evidence must be proved~~ declaration, else no recovery can be had. Because ~~had~~ if suits another suit which exactly tallies with the contract, be brought, recovery might be had twice on the same contract.

If the contract proved & the declaration do not exactly ~~tally~~ correspond, the contract may be demurred to.

In the case of a note the defence is to be disclosed by plea against the contract.

All the requisites which the law requires in a ~~declaration~~ contract detailed at length must be stated in the declaration. Except when the contract ought to be in writing by statute, it is not necessary to state in the declaration that the contract is in writing. But it must be proved to be in writing. Of course in such case an arrest of Judgement cannot be pleaded.

A mere moral obligation is always sufficient to raise a promise. But an Action cannot always be brought on that promise; because the party may not stand in need of it, there being a higher remedy. As should A promise to pay B a bond which B holds against him, an action will not lie on the promise, but must be brought on the bond.

But whenever a promise raises a new consideration an action may be sustained on that promise to recover damages. ~~by~~

New York
Q. P. Dayton

Ex. Gr: Should A say to B, I do not know that you have a bond against me, if you will show me one I will pay it; has an action lies on the promise for damages, tho not to recover on the face of the bond.

It may be a question whether on principle money can be recovered? It is settled by decisions, in Indebitatus Assumpsit, the Court will allow the Deft to introduce any equitable circumstances. Indeed Indebitatus Assumpsit in its operation has the appearance of a Bill in Equity. 4 Burr 2133. Stra 915. (1)

It was formerly disputed but it is now settled, that if an agent collects money from his principle & in receiving it takes thro' mistake more than the debt, ~~the Debtor of~~ the agent has not paid it over ~~the money to the principle~~, ~~can~~ it can be recovered ~~the money~~ from him ~~the agent~~, in an action of Indebitatus Assumpsit. ~~Money~~ ~~he has paid it over to the principle, the action cannot be sustained against him~~. Stra 480 & 486. 5 Burr 2639

Also when money is paid on a contract for something which turns out to be of no value, it can be recovered back in an action of Assumpsit. But then the person who brings the action for the money, must deliver back to the vendor the thing contracted about. ~~5 Burr 2639.~~

If the vendor ~~the property~~ has no title to the property sold, the original owner ~~pretended to sell something~~ ~~he had sold nothing~~, & receives the money, he will be an object of Indebitatus Assumpsit. ~~The money paid, whether it was a mandatory sale or not, the money can be recovered back in Indebitatus Assumpsit. Accepting it was a bargain & sale, & a compromise of a doubtful title, for the same consideration that contracts are founded on a sufficient consideration~~. 1 Str 732. Palm 364.

~~If money~~ money is received under a void ~~or~~ authority, ~~the action of Indebitatus Assumpsit lies to recover back that money~~. 1 Salk 17.

Money stolen ~~when felo~~ is committed, is said cannot be recovered back, ~~to the~~ (2) ~~The reason given are that all private rights are merged in the public good, for they should be false & perjured upon conviction, & therefore they belong to the public. Quere? Will that reason apply in this case — or have we some law as a perfect property & chattel. Judge Buller seems to intimate that it does not, indeed they have avoided the principle in Equity ~~in the goods were embezzled, they are recovered back~~. Bull NP 130. (2)

~~When a recovery has been obtained by judgment, Error, & after the money has been paid, a writ of error comes, & the former judgment is set aside. Then money can be recovered back in an action of Assumpsit. The same~~ Money paid upon a judgment which is afterwards reversed by writ of error can be recovered back by this form of action. ~~Bull NP 130.~~

~~Also when a new trial has been granted.~~ Cowp 419. When goods & merchandise has been sold, Assumpsit lies for the price. Also in the case of Barrister, for a Physician or Lawyer's fees. Also upon an ~~[illegible]~~ agreement ~~[illegible]~~ Carpenter's ~~[illegible]~~ If a man after bargaining with another for the purchase of an article, the vendor after strongly ~~[illegible]~~ it can be matter of Assumpsit, ~~says that he will deliver, in this case if~~ A leaves the house ~~to~~ can sue for the money, & ~~[illegible]~~.

(1) A broker was allowed to give evidence, without previous notice of his right to detain £40 of money rec.d by him, as a reasonable sum for commissions. 4 Mas 219.

(2) There is a State of the State of New York that detainer that the private remedy shall not be merged in the felony.

(1) If a promise is made to A for the benefit of B, A alone can
442 sue for it. But he is liable in assumpsit to B for the money
recovered. 1 Vent. 6. 318.

(4) If however a promise is made for the benefit
of a ~~stranger~~ near relation of one of the contracting
parties, that ~~party~~ person may maintain an action in
his own name. 1 Vent 6. 318.

This principle has been established in the circuit
court of the United States in the case of the daughter of
Elman Allen vs Ira Allen before Chief Justice
Ellsworth.

If in this case the vendor gives the vendee credit for the £43 money the right of the estate sold is in the vendor. ~~If he gives credits, B, the vendee, is the legal owner of the property in B, & of the property contract. And if it appears to deliver the goods at some future period, he is considered only as the bailee of B, and is liable for all Cooper 295.~~

A mere voluntary, civil or kindness lays no foundation for a recovery. ~~If there is no pecuniary duty, or other consideration, the law considers it a sufficient consideration to support a promise.~~ 2 Str 720.

There must a consideration always appear in the declaration, else no recovery can be had. This doctrine of considerations appears to be an arbitrary one, because Courts can never enquire whether it is an adequate ~~consideration or not~~ or if it is that a person will do what the law requires him to do no action will lie. ~~If the consideration is unlawful, or a promise is made to a person to perform what is his duty to perform, the action of assumpsit lies not.~~ 2 Str 924.

~~If the consideration the past is was forming but that no recovery could be had. But the law is now altered; for if the act done is beneficial to the party for whom it was done, he is bound to pay for the consideration is part.~~ Cro J. a Cro 202.

A part consideration is a good one. Cro J. a Cro 202

A promise to pay a bond which is out-lawed or ~~which is outlawed~~ lost ~~will~~ binding ~~for it is a benefit to the person.~~ Cro J. 206. 213. 598. (1)

~~It often happens~~ happens that the promisee is the legal proprietor of a promise, at the same time that the beneficial interest belongs to a third person. ~~Viz,~~ A promises B a s. of money for the use of C, here B is the legal proprietor, & the beneficial interest is in C. In such contracts ~~as the above~~ it is a general rule that ~~being~~ the action to enforce such contracts must be brought in the name of him to whom the contract was made, and that the Cestuy que use ~~can~~ recover it from him ~~who is the legal proprietor.~~ 1 Vent 318.

(1) In this general rule there is an exception, ~~in the case of promises,~~ for in promises the Cestuy que use has in several instances maintained his action; the reason given in the books for this, is, because of a relationship which subsists between the parties; indeed in all the decisions there is a relationship. But the Reporter is of opinion that relationship is no ground for allowing the Cestuy que use from bringing the action. He is therefore of opinion that all such contracts, as well by bond, as by promise, the Cestuy que use ought to be allowed to sustain the action. 1 Vent 318. H. 6.

The above has been the practice in Connecticut for in an action of secret assault & battery (in which action if the Pltff recovers a fine is due to the State) a recovery was had by the Pltff at the County Court; the Defdt appealed it, & gave bonds to the State, as is the custom, to prosecute the suit to trial; before the time of trial, the Defdt pays the Pltff the Judgement recovered at the County Court. The question was in what method the Public was to come at the £20 fine. The Indebitatus was brought in the name of the Public, stating the bond & raising a promise thereupon. This went thro' all the Courts to the Court of Errors & it was determined for the Public.

There has also a case of this kind been determined in the National Court. Herman Allen gave his only daughter all his estate by his will; he made his brother Ha his executor, & conveyed to him his lands in Vermont, taking promissory bond of £30,000, that he would convey them to his daughter. The question then was how the estate could be got at. They found, that if a bill was filed in Ch, his property would be all attached, before a decree could be obtained. And to sue Ha Allen in his name as Executor would be nugatory. They therefore brought Indebitatus Assumpsit; stating the contract in the name of the Daughter. The question came on before Judge Chase; but he was doubtful, whether the suit in this form could be sustained. He however continued the cause, & they then filed a bill in Ch; the cause came before Ch Justice Ellsworth, who said that the bill in Ch was not necessary, & gave judgement on the Assumpsit.

In What Cases Demands must be made before a suit can be commenced.

It is laid down in the books that wherever there is an antecedent debt or duty, no demand is necessary to make a demand; But where there is no antecedent debt or duty, ~~then must a~~ demand must be made, ~~before the action can be sustained~~.

This rule Judge Reeves conceives will not embrace all the cases. He has therefore formed the following, which from long practice has been found to be correct, viz, If the nature of the transaction is such, that the Deft cannot by a tender of the thing contracted for, perfectly free himself from the debt without demand made, a demand must be made before a suit can be instituted. ~~viz~~ If a Blacksmith gives a note to be paid in his work, here he cannot by a tender perfectly free himself from the debt, neither can the obligee of the note sue it until after he has made a demand. (1)

~~So also in case of Doubtfull debts from a merchant to a merchant, the tender of the Doubtfull must be made after the goods, & he is obliged to take what the merchant has in his store. Neither can a merchant get a tender in his debt, to the holder of the Doubtfull.~~ But in this case a merchant cannot relieve himself by a tender.

~~Neither is it supposed that the treasurers of the public are to hunt up Public Creditors; they must demand payment of the Treasurer.~~ Public creditors must also make a demand previous to suing.

The ~~It has~~ been always a customary insert in a declaration the words "tho' often requested & demanded" ~~This~~ Judge Reeve apprehends it to be only a matter of form, ~~tho it may be sufficient ground for special demurrer; yet it cannot be taken advantage of by plea in abatement~~

When notice ought to be given

~~The ground on which it may even be necessary to give notice appears to be as has a man is indebted as the other, he does not know the principle which governs in this description of cases, that an indebtedness exists without the debtor knowing it.~~ (2)

Notice is necessary to be given in the case of Orders, & Bills of Exchange; for the law supposes it unreasonable if sue a man who if he had had notice, would perhaps have paid the debt.

(1) This seems to be much good sense in this rule; for if it is in the power of a person to relieve himself from a ~~demand~~ debt by his own act he ought to do it of his own accord, & if he omits so to do he cannot complain of hardship in being sued; for it was his own fault that he did not relieve himself from the demand. But the situation of a person who has it not in his power to relieve himself is very different.

~~The case of Jones against Fowler I should approve, forms an exception to the rule.~~ (3)

~~(2) Negotiable notes after they are assigned I should apprehend stand on the same footing, for they are nothing the mean of the rule, and the statute declares that they shall be governed by the same rules as inland bills of Exchange.~~

~~(3) A demand & refusal in Trover is evidence of a conversion. But if a conversion can be shewn proved a demand is not necessary~~

(2) The Drawers & indorsers of bills of Exchange & makers of promissory notes are entitled to notice of the non payment of them before they are sued.

(1) It has been repeatedly decided, that if the acts to be performed by each party, are to happen at the same time, that performance, or tender of performance must be stated. It has further been established, that the prime star in judging of what is the effect of promises, is the intention of the parties. See the last Edition of Saunders for a full exposition of this subject.

Also when a man engages to do some business for another and before the employer is appraised of its being done, he is sued. Want of notice in this case is a sufficient ground to set aside the action. Hob. 51. 60. Cro Jac 183. 523.

The rule of discrimination in the above cases appears to be; when the act to be done is of general notoriety the Creditor is not bound to give particular notice; as in the case of a promise to pay do something on a marriage. The marriage was decided to be an act which gave sufficient notice.

Whenever ~~it is necessary that~~ a Demand or notice ~~be made~~ it must be stated in the Declaration ~~or else it is totally bad~~. ~~Whenever a Fact on which the action or suit depends, is made to take effect at some future time, after the time for carrying the contract into effect has passed & right of action has accrued to the opposite party; a new agreement to waive up the bargain will not destroy the party's right of action, because that an agreement is without consideration. But an agreement entered into between the parties, to waive up the bargain, before the right of action had vested, ~~would be~~ binding.~~ Cro Jac 620. Cro Eliz 584. 1 Mod 205. 5 Jac 44. 1 Sid 177.

Of Mutual Promises.

When the right to recover is founded on ~~the consideration of~~ the promise, the party had not ever performed on his part, the other party has a distinct right of action. (1)

~~Supposing A promises for £ 200, to give B, at a specified time four acres of Land. B promises, at the same time, for a Deed of the four acres to pay A £ 200. Both promises are in writing. It has been made a question, whether, if these acts are not accomplished at the time agreed upon, by either party, they can be afterwards enforced? Judge Nisi is of opinion, that the time agreed upon ~~by the~~ passed, the contract is at an end. It is also necessary if either party is sued on such a contract, that averment be made ~~to state it has been performed~~ of performance. ~~In some cases it is necessary to state fact made the thing is performed, & the rule of discrimination is, that if it is a matter of fact, merely the evidence need not be averred. Upon an assumpsit to be a thing, proved the manner of doing it involves the question of law, it is necessary to state in the declaration the performance in which it was done. Cro Eliz 292.~~

~~In assumpsit it should be shown that the ~~Upon the action of assumpsit to show that the~~ indebtedness was ~~such, as that you have a right to have an action~~ as contract ~~distinguished from any other. Indebitatus by specialty.~~ Cro Jac 206. 1 Sid 182. 2 Carth 276.~~

~~In an action of general assumpsit it should appear that the contract was of such a nature as would not under~~

~~Of The modes of Defence in Assumpsit.~~

~~In the action of Assumpsit~~ The general issue in Assumpsit is ~~non Assumpsit~~, which when pleaded puts all upon trial. And the Plff is obliged to show every fact which he has stated.

Under the ~~Defence~~ Plea of non Assumpsit, which is the general issue, the Deft is permitted to give in evidence any thing which goes to show that he is not liable. ~~The meaning of this term "Non Assumpsit" is that the Deft is not liable.~~ ~~With regard to~~ The manner of pleading ~~it is the same in express, or in implied Assumpsits.~~ ~~Formerly there was a distinction, but it is now exploded. Waller v. P. under head of Assum.~~

There are some defences in Con which cannot be given in under the general issue. Viz. If the Deft is ~~plea~~ saved by any legal act of the Plff, such defence must be pleaded specially. ~~as a~~ Discharge of the Debt.

If in a Contract on a promise, there appears any thing on the face of it to prevent a recovery, such defence may be taken advantage of by Demurrer. Or it may be plead specially & shown upon the record.

Whenever there is a right of action admitted, but some new matter is alleged sufficient to prevent the Plff from recovering, it is called a plea in bar. Pleas in bar are numerous in their kind, & in treating of them, the Law applies as well to pleas in bar in other actions, as the action of Assumpsit.

The first plea in bar mentioned is a

~~Tender~~

The general rule regulating tenders is, when the Debtor duty has by the instrument, contract, or in any other manner become certain, & each party knows of its certainty, it is lawful to make a tender. But if the Contract is uncertain, the tender is no bar to an action brought, unless the Deft will tender the whole sum alleged to be due. In actions for trespass, slander &c no tender can be made, because the sum recoverable is uncertain.

The above mentioned rule is the Com Law rule, but Stats have made innovations.

Formerly we had a Stat in Con; that if on an action brought, on a voluntary trespass, the Deft tendered as much as the ~~Court~~ Court allowed; he was obliged to pay his costs, for it will be allowed a good tender. That Stat is abrogated. ~~in Con~~

~~Tender in Pledge.~~

~~In the strictest sense of the word, the debt is not paid in a tender & refusal; but. When a pledge is in the hands of the creditor, a tender by the Debtor discharges the lien of the thing pledged. Neither in the fullest sense of the word is he any longer his debtor, because the interest stops from the time of the tender, & the creditor can recover his costs in an action brought for recovery of the debt.~~

(1) This is a question in what light the ~~Debtor~~ Creditor is to be considered after [illegible] Whether as a ~~Debtor~~ Creditor or a Bailee to the Creditor? This [illegible] tender, by bringing the money into Court, the tender [illegible] always beat the tender or Obligee.

(1) When the creditor holds a pledge, the Debtor by tendering the debt, discharges his lien, and may remove it, together with his costs.

But if he is still a Debtor it appears to be incongruous, that the Creditor should not recover. But considering the Debtor as a bailee, it would preserve the symmetry of Tender Justice, to whom the Money was due. If the Debtor keepeth his money after a tender the ~~If it is also agreed that if the Creditor refuses his money, the~~ Debtor must pay it ~~over~~, & if he refuses, ~~on demand made, he loses~~ all benefit of the Tender, ~~& from the time of the demand, interest begins to accrue~~ & is liable for interest from the time of his refusal. holding after Tender, judge, Reason considers ~~that~~ the tenderor, ~~having no right to the money, but the law has imposed upon him~~ the Money merely as bailee for the plaintiff. ~~for the sake of bailee for his creditor, & as bailee only is he liable for~~ does he apparently seem to be liable. It is important that the law on this point & the subject, for if he is only to be considered as bailee ~~Should the money be lost by inevitable accident, or be stolen from him, or should he lose it in any way so that would not subject a depository, he would not be liable, if he was considered as bailee, instead of Debtor; it therefore becomes important to determine whether he is bailee or Debtor.~~

~~The~~ To consider him as bailee certainly accords far better with the feelings of mankind, for they always wish him who has been guilty of neglect, or a fault, to suffer the consequent loss, which has occurred by his fault. On this question there has been but very few decisions, ~~But~~ it is however universally agreed, that if the obligation is for any collateral thing, ~~the~~ tender ~~pondering of the money~~ is a complete discharge of the obligation. ~~On what ground then, is there a difference~~ The only difference that exists is between Money & other articles ~~Money, except that what the law does not impose on the debtor the burthen of other Articles in accounting of them but the~~ that money being ~~such an Article as can easily be better taken of; it seems reasonable that the Debtor should keep it for his Creditor.~~ Money being such an article as can easily be better taken of, it seems reasonable that the Debtor should keep it for his creditor. 5 Mas 506.

~~The principle that the Debtor after tender of money becomes only bailee to his Creditor is recognized in two cases cited in the 5 Mas 506.~~ One of them was the following. A owed B one hundred shillings, which at the time it became due he tendered in shilling pieces, being at that time a lawful tender: afterwards B sued A on the obligation; A brought the same pieces of money into Court, which had then decreased to half their former value. The Court determined that B should take the indentical reduced pieces, as a compensation for the Debt. — Thus we think the tenderor still continues a debtor ask, If the money vest in the tenderee, of what use is the note ever afterwards? They serves certainly to pay the money, though the [illegible] never vested in the tenderee. They reply. — But this reasoning however is fallacious; for it is considered by the courts, & made the only method by which a creditor can recover after tender. The note abstractly considered has no intrinsic worth after tender, for it draws no interest, yet it must be brought into Court & given up for the money, which without the note he could never get.

The plea of after tender is made. The money is sued for, it must be pleaded, ~~that the money~~ that the tender of money & that was tendered, & has always been ready & is now ready; ~~to other articles, sufficiently pleaded, that the same tender & is Cont.~~ of of utility, the plea is that they were tendered according to contract.

In case bulky articles are tendered & refused, courts have ~~protected~~ relieved tenders from taking care of them. (1)

If the ~~case why a person has not made a tender is owing to the debtor, or is~~ plaintiff has prevented a tender it is sufficient for the debtor to state that he & the tender ready to tender.

If a creditor has ~~removed away~~ left the country the debtor is not required to make him a tender. If he has left an attorney a agent ~~there~~ it is sufficient to make a tender to him.

In the treaty of peace of 1783, there was an article that ~~all bona fide~~ debts should be in unpaid & that the States should make no ~~a retaking debts due from the to the State~~. A Many of the States made laws on the subject, some no doubt in abrogation of the Treaty, & some not. Can such a law in this Country be chargeable as being against the treaty. Judge N. thinks it is not.

This State enables a Committee to discriminate what was reasonable of those debts which were due to Refugees; this State still in effect, unless repealed by ~~some~~ a very singular law. Congress recommended to the States to repeal all laws repugnant to the treaty, & the States passed such acts. The question then arises, was this law repugnant to the treaty? The State courts upon the Creditors being inaccessible, & not on the ground they are enemies — for being there inaccessible a tender ought to stop the interest. This Committee was appointed to see that justice was done between the parties, therefore if the Debtors never offered to pay the Debts, they ought certainly, when called upon, to pay the whole sum. But when the creditors were inaccessable, & the Debtors having at that time Continental money sufficient to pay the debt, & were ready to tender, & always had been; certainly it is equitable that the creditor should bear the loss, of the depreciation of value. In whatever the money was worth at the time of the tender, the creditor ought to take when demanded. Viz. J.S. being in 1775 indebted to J.N. £100. went to Hartford to tender him the money, but J.N. had gone to Boston within the enemies lines; certainly J.N. in this case could claim no interest after that time. And if the money had depreciated, J.N. ought to bear the loss. — If J.S. had tendered the Continental money, when £100 was worth no more than £40, the £60 ought to be deducted out of the £100, & interest stopped from the time of the tender. On the grounds the last paper in Congress, which certainly was in favour of the creditor.

It has also been decided by the courts of law that this act is not abrogated, therefore it is not contrary to the treaty.

~~What acts constitute a tender.~~

When money is tendered the Debtor must ~~tell~~ state in what it ~~credit~~ accounts ~~he tenders it.~~ ~~If he owes the creditor on book & by note, the creditor has his election, for which the tender should apply~~ If he has, not the creditor has his option in applying it. There must be an actual manual offer of the money, but the debtor is not obliged to count it out, provided he can ~~prove to be~~ prove that it was sufficient. ~~tendered~~ Lutch 70. 2 Lev 209. 5 Co 115.

Formerly it was a question whether the Creditor was obliged to take the money when so much was offered? It was decided that he was obliged to take it, for it is the creditors business to count. ~~the money he receives~~ Sty 916.

~~The tender must be of lawful money, such as by proclamation~~

In law all money which passes current, is a good tender, excepting coppers, & this on account of the inconvenience of a legal tender in trivial sums. The ground on which such money is current is because every person knows its value, for that reason Indian gold & silver would not be a legal tender.

It is laid down in the books that if a person receives counterfeit money there is no remedy. All that is meant by this is, that there is no remedy upon the obligation; but the person receiving counterfeit money has his remedy as all persons have who receive things of no value for a valuable article. (1) Co Lit 260. 5 Co 115.

It has never been determined that bank bills are a tender in law. But if the creditor makes no objection to them, they are a tender. Yes they make head of tender. Since which from a case in ... it appears that the court were of that opinion. The Point was not the point decided. — They are not to be considered in this Country, because we have one of general currency. Query

Bank notes are a legal tender provided no objection is made to them.

(1) ~~The circumstance of its not being the duty~~ reason of the difference is of the Debtor in the case of the money to keep it, and its not being his duty to keep the collateral thing tendered is the reason of the distinction between the pole in the two cases.

(1) This point has been decided in the Sup: Court of this State. See Johnson Reports.

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(1) It is a rule of law (tho' not of equity) that no tender can be made after the suit is commenced.

~~(1)~~ This rule proceeds upon the idea that when a right of action has once vested & been accordingly commenced, that the suit shall not be defeated by any act of the Defendant.

But notwithstanding this rule, still it is true ~~tho~~ in practice in England, that when the thing for which the action is brought can be restored in specie, & not diminished in value, ~~it is usual in practice to restore the goods to the plaintiff the~~ to restore them, & for the jury then to find nominal damages. Lep Digest 567. A tender must be the amount of the debt & of costs.

(2) It is a rule in Equity, that if a note which is not negotiable is assigned, & the assignee gives notice thereof to the obligor, who nevertheless pays the money to the original obligee, he must pay it over again to the assignee. Mon 37.

Place of Tender.

If a time is not mentioned in the appointment, then the tender must be made at the place appointed. If no place is appointed it must as a general rule be made to the person of the creditor. If the creditor is out of the realm, to his agents to tender answers the purpose of an actual tender. Co Lit 210

From the above rule it follows, that the place where the creditor lived is not the place where the tender is to be made: for if since the bargain he has moved, it is the business of the Debtor to follow him. This rule however must not be so construed as to subject the Debtor to an unreasonable inconvenience, for unless his moving is a matter of public notoriety, if the Debtor does not expect to make the tender until the last day upon a supposition that he lives where he did when the contract was made, still he will have the benefit of his tender. Co Lit 210.

There is an exception to the general rule in case of a tenant; for if a tenant tender at the mansion house it is sufficient; this rule does not however extend to Connecticut.

It is also said that at the appointed place, provided the creditor be there, a tender may be made by letting the money in the mortgagee's house. 2 Ow. 370. In which case the money was tendered only for the purpose of stopping the interest. Judge R – apprehends there is no more reason for the rule in the case of mortgages than any other.

When a contract to deliver other articles than money, if there is no place appointed, it is not necessary to tender them at the creditors house; but it is sufficient to deliver them to the person of the creditor or to know where he will have them delivered. – It is not necessary however in every case to deliver them at the place the creditor appoints, but it is sufficient to deliver them at the place the creditor lived at the time of making the contract. Next even if it is insisted the debtor must deliver them at the place the creditor lived at the time of making the tender should reside prior to the tender. – at the time of making the tender. If the parties have made it the place the creditor lived at the time of making the contract, it is not necessary to deliver them at the place the creditor lived at the time of making the contract. Nevertheless notwithstanding the tender is good after the time appointed.

(1) In this subject the rule of different at law from what it is in equity: After an action is brought at law to recover a Debt a duty no tender will be good. (1) But at equity a tender may be made at any time during the trial.

Con. Law Courts in Con. follow the equity rule in Eq. but at Law & equity.

As to the sum which must be tendered in case where a tender is allowed the rule is, that it must be the sum due including the interest & the costs which have accrued up to that time.

If the place where the tender is to be made is agreed upon, the appointment terms thus. "If Jack paid at or before the 1st day of July next, it must be made before the expiration of that time. Plow. 172. & Co. 112. & Ll 73.

A tender must be made in the ultimus convenient part of the day. If the debtor goes in the morning, or at noon, & does not find the person who is to receive the money; a tender of the money is to be tendered good. Co Lit 211.

The ultimus convenient part of the day means, by day light sufficient to count the money; If stock is to be transferred, while the bank is open & the ultimus convenient part of the day thereon depends upon the time in which it is to be transferred. Ll 14. & Co 92.

If the day on which the tender is to be made happens to be sunday, it is the Com Law rule that the tender be put off till monday. But in the general opinion of the Law, it is must be made to the obliger.

At Com Law, if note is assigned, or notice given to the obliger, he must pay it to the assignee, unless it will put him to great inconvenience. – After Con after notice is given, the assignee may sue the assignor & obliger. The Chancellor in Eq established the above rule; Bay Law in Cons. 1 Ron 77. (2)

Negotiable notes must be paid to the assignee, also the tender must be made to him.

A Tender must be made to the assignee of a negotiable note; but the assignee cannot sue without notice.

~~In fact the Courts have adopted the same rule by principles concerning the assignment of notes. Judge P. is of opinion that in [illegible] when the assignor who is a bankrupt, refuses the tender, the assignee may sue on the note & the tender cannot be pleaded in bar. But had the bankrupt assignor accepted the tender, the action of plaintiff would be against the original obligor.~~

~~Mode of Pleading a Tender~~

~~The plea [illegible] the same form as all other pleas in bar, viz. That at the time it is stated that the Deft did give & execute the instrument on which the action is brought, [illegible] day & place, or may appear that the day & place be made on the day & place the debtor appointed or convenient place of the day made a tender of the Debt or duty [illegible]. It appears on the record that the tender was made before the last day allowed for the tender, it must be further stated that the parties met at the place agreed upon, & there the Deft tendered to the Plff &c. Or it is stated that it was on the last day of the tender, but not in the debtors convenient place of the day, it must be stated, that the Deft met the Plff, & then made a tender &c. Cro Jac 423. 2 Roll 688. (1)~~

~~To make a good plea it must be further stated that the Plff refused to accept the tender, unless it is shown upon record, that the Plff was not present when the tender was made ready to be made. 1 Lid 13. 2 Lev 23. 2 Vent 109. 1 Ak 623. 3 Ld 388. 389.~~

~~It must be also averred that you have always been ready, still are ready & now tender. The same in Comy. 9 Co 79. Co Lit 207.~~

~~(1) A Tender in some cases may be a debt, or duty as in case a person tenders himself according to the terms of the agreement to build a house, & the Plff refuses to accept, [illegible] damages [illegible]~~

~~If after tender the money is demanded by the Obligee, the demand must be made at the house of the obligor, for it is not to be expected that he will carry the money wherever he goes.~~

~~When bulky articles are tendered, it is impossible the obligee should receive them on the day of the tender, & if they are any way damaged it is his loss, for the obligee has performed his duty.~~

~~David J. Daly Editor~~

~~Defence by Accord & Satisfaction.~~

~~An Accord is an agreement between the parties, that the party claiming shall be satisfied with something in lieu of what is actually due.~~

~~With very few exceptions accord is a defence against all personal actions, vertiones as well as other.~~

~~To make an accord complete the article given must be something which the law deems of value. (1) It is a settled rule, & is laid down in the books that an accord is not a good bar to an action founded upon the Covenant, or single bill. This rule [illegible] Petition [illegible] an obligation [illegible] by an instrument of [illegible] must be taken with the following exceptions viz. [illegible] That an obligation cannot be satisfied by something [illegible] a single obligation [illegible]. When the Debt or duty grows out of the instrument itself, accord cannot be plead in bar to it; for such contracts can be broken only by a sealed instrument. But when the debt or duty does not depend upon the Instrument itself; but on some subsequent breach; it does not require a sealed instrument to bar it. But any thing which shows that the Deft is not liable for the breach, may be given in evidence. 2 Roll 180. Yelv 125. —~~

~~S.J. A Covenants to pay B, £20. then the Debt grows out of the Deed. — A covenants to pay B £20, on condition he does some business at N.Y. This depends on a subsequent breach. Co Co 44. Cro Jac 650. 99. —~~

~~There is no such distinction in Con as the foregoing; & accord may be pleaded in any case of bonds, covenants, &c. The maxim Dissolvitur eo ligamine quo ligatur is therefore not true in all cases. [illegible] When the right of recovery [illegible] accord was [illegible] accord may be pleaded [illegible] the indebtedness grows out of the Deed. Co Lit 46.~~

~~When there are a number of Debts an accord [illegible] a complete discharge of the [illegible] 9 Co 79.~~

(1) When the time is not particularly named, ~~but~~ but it specifies on or before such a day, then it is necessary that the person who is to make the tender should be at the place appointed in the last time of the day, and if he come before he ought to continue there until that time. But if he meets the other party then at any other time within the period allowed for a tender, then it is sufficient for him to make a tender at that time. 12 Ray 686.

(2) It is a general rule that an accord & satisfaction to be a sufficient defence to a sealed instrument must be under seal: if however the debt or duty does not depend on the instrument itself but on some subsequent breach, or an agreement to pay money upon the accomplishment of some business, it is not necessary that the accord should be evidenced by a seal.

2 Ford 186. Yelv 125: 6 Co. 44. Co. Litt 50. 99.

(1) It is not the quantum of value which is considered in determining what is a good ~~accord~~ accord;

(2) For a bare accord without satisfaction is no plea. Therefore whereas the Deft pleaded "that his several creditors, one of whom was the Plff, had come to an agreement to accept of a composition in lieu of their respective debts from him, to be paid within a reasonable time after that he tendered & was ready to pay." This was held on demurrer to be no plea to this action for the whole demand: for it was a mere accord without satisfaction, an agreement unexecuted, & being without consideration, was nudum pactum, & so could not bind the party.

But for Just Weller, if the Deft had assigned over all his effects to a trustee for his creditors in order to pay them all. Per tota, it had been a good bar. Lep 147. 2 Ter 14

(3) ~~Therefore~~ And therefore one bond cannot be pleaded in bar of another, for that is of no greater value, unless the security ~~[illegible]~~ or circumstances are bettered; as by shortening the time of payment. Lep 230. Hob 68.

And the bettering of securities alone is not sufficient; for a bond with sureties is better than a single bond, & yet the former cannot be pleaded in bar of the latter. Lep 230. Cro El 727

(4) The ~~stat~~ of this ~~stat~~ is as follows — That all actions upon the case ~~and~~ of account, other than actions for slander ~~and~~ actions which concern the trade of merchandize between merchant & merchant, their factors or servants, and all actions of debt for arrearages of rent, & formed upon any contract without specialty, and all actions of trespass, detinue, & replevin for goods or chattels, and actions of trespass quare clausum fregit, shall be commenced & sued within six years next after the cause of such accused, & not after; & all actions for assault, battery, wounding & imprisonment, or any of them shall be commenced & sued within six years next after the cause of such actions accused & not after, & all actions for words spoken within two years. For this the residue of the stat see stat N.Y. 563.

An accord cannot be made as to change land the right, because the law requires certain solemnities by deed to pass land. New York is of opinion however that an accord may be a good ground for a Bar to compel a specific execution of a Deed. But for any Thing may be done in satisfaction, where accord & satisfaction is a good plea. Yet for an action of Debt on bond, in which the thing to be recovered is not an accord & satisfaction of the Debt, nor is an accord & satisfaction of a lesser Thing a good plea. 1 Roll 128. Plow. 4 Mod 88. Law of Evidence.

An accord made in consideration that another release the equity of redemption is not good, for in the eye of the law an Equity of redemption is no consideration. 1 Ld 2 Will 86.

Courts have formerly determined that no satisfaction of honour is a bar to an action. But now however is of opinion that our courts would conceive it a sufficient satisfaction. 1 Roll 120. 9.

It is not the quantum of value which constitutes a good accord, for it is sufficient if the thing has in the eye of the law any value. (1) it must however be something else than that which the contract specifies, for if it is accorded & agreed to take £5. for a Debt of £15. it is not a good accord, because there is a complete Demonstration that it is not the value of the Debt. (3) But had a hat been given for £15. it would have been a good accord, for there is not a Demonstration but that it is worth £15. Sho 426. Cro El 193. (2)

An accord must be certain on the face yet. Therefore if in relinquishing a dwelling house to another in consideration of an injury done him is not a good accord, nor is an accord to labour 2 or 3 days. 9 Co 79. 1 Roll 129. Yelv 203. 1 Mod 69. Cro El 905.

An accord not executed is no bar to an Action, at the time it is made. Yet if the accord & satisfaction is made the party accepting to plead the accord & satisfaction, but this is not now necessary, it sufficeth to state the whole agreement, but it is a very plea, for it is a good plea. The Ley of accord & satisfaction is, that it was accorded & agreed to accept a certain thing in satisfaction, & that it has been done. Sho 573. 5 Mod 86.

Of Defence by Stat of Limitations

(4) Legislatures in almost every Country have thought proper to enact Statutes which will bar creditors from the benefit of legal process to collect their debts, provided they are not collected within a certain time. (4) This time in Eng is six years for a book debt, or a promise. — Six years is also the time in Con in which debts must be collected. Pen Stat also enacts that unless bonds are collected within 17 years they are barred by the Stat of Limitations.

But debts which have been barred by the Stat of Limitations may in many cases be revived. If upon the Debt being barred by the Stat of Lim the Debtor promises to pay the debt, it can then be recovered in the first Jurisdiction, for a promise to pay revives the first Jurisdiction. It is not in the Power of the Debtor to plead, he has since been a promise to pay.

An opinion has prevailed that the Stat of limitations was made for the purpose of reducing to a certainty a presumption that such debts have been paid, and that debts are taken out of the Stat in consequence of that presumption being rebutted. But it has been determined by a Court of Eq that when a man makes a will, & declares his Ex's to pay all his debts, the Ex is bound to pay those barred by the Stat of limitations. This presumption is because if the debts are paid, the Ex can sue for the debts.

~~Lord Ch. Ju. adv. Tremaine opinion to~~

~~Also if there prove also advertisements pay all his debts.~~
So also if a man causes an advertisement to be inserted in the papers for
~~those barred by Stat of Limitations are collected.~~ ~~Those therefore that~~
~~are barred by the Stat of limitations must be considered as debts~~

It is argued by some, that the ground on which the Stat proceeds
is, that if the indebtedness is actually ~~made out, & then~~ proved satisfactorily,
the Debtor must pay, the Stat of limitations notwithstanding.

But whenever the Stat of limitations has run against a Debt, & the
obligor owns the indebtedness, but refuses to pay, it does not take it
out of the Stat of limitations. The above ground therefore is fallacious.
This idea originated from the erroneous consideration of those cases ~~where~~ in which the Debtor acknowledge
the Debt, without refusing to pay it, ~~which takes it out of the Stat.~~

~~Another ground taken is that the Stat depends solely on a presumption, the ground on which this presumption is founded has ceased.~~

The ~~true~~ rule Judge B apprehends is, ~~that any act of the party,~~
~~which amounts to a waiver of the Stat of limitations, takes the case~~
~~out of the Stat~~ ~~(1) Lumpkin 463 prec.~~

The whole is given by the Debtor that he will never take advan-
tage of the Stat, the Stat will not run against the Debt.

If the Stat is pleaded in Bar, it must appear on the record, & be
pleaded in bar.

Our Stat says that no action can be brought on a bond after it has
run 17. years. It has been made a question whether a promise could
revive it? It has been finally determined after conflicting contradictory
decisions, that it will, ~~revive by a~~ ~~The action~~ If a bond be barred by the Stat of Limitations, Judge K. concurs
Mag. be brought on the Bond or on the Promise at the Pltfs election. 5 Mon 2628.

From the form of the action of Indebitatus Assumpsit it cannot
be ~~pleaded~~ discovered on which promise the action is brought, ~~for the~~
~~indebtedness is the gr. of the action,~~ ~~However,~~ but from the following
authorities, ~~it may be clearly learned~~ however it appears, ~~since it is considered~~ ~~when~~ it is
that the action is brought on the first promise. Carth 471. 2 Mon 1099.

The following cases ~~of the~~ ~~have been~~ ~~decided~~ of promises which take a Debt or Duty
out of the Stat of Limitations. 5 Mod 426. 1 Salk 29. 2 Fr. 255. 2 Ver 251.
This decision of Ver is contradicted in Doug 629. Whitwell vs Whitney &
Esp says that ~~that~~ the law in this case is not law. 3 Pr W 84. 2 Ven 124. Pr Ch 385. 3 Atk 107. Cowp
Esp 297.

If an action is brought in Eng on a promise of more than six years
standing, or on Law on a bond of more than 3 years standing, it is ~~seems~~
not proper to Demur to it, for ~~that circumstances which may take~~
~~it out of the Stat of Limitations may come within the promise~~ To prove a case within the exceptions to the Stat
~~the Stat, Pleas shall not run against absent persons to the~~
~~rights of persons who are beyond sea. But it seems~~ Pltf of Pleas

The Eng Stat of Limitations does not begin to run ~~in all cases~~
~~from the time of making the promise, & never~~ until the time that
the right of action accrues, ~~& when the cause accrues subsequent to~~
~~the promise,~~ & then the plea is Quod actio non accrevit infra sex annos. & the

By Stat of Geo it is enacted, that promises shall not be
received unless prosecuted within three years from the time of making
the promise. From this Stat one is led to conclude, that a party
could plead the Stat, altho a right of action had just accrued to the Pltf.
But the Stat of Frauds & Perjuries acts this St, for it declares a promise by
parole, is not binding, unless paid within a year; of course there must
be two years from the time the right of action accrued, before the St
of Limitations can be pleaded.

It is established that in Eng the Stat of limitations cannot
be given in evidence under the general issue. 1 Salk 278.

In Ca the St may be given in evidence under the general
issue, but cannot be pleaded in Demurrer; the most Ca. like
manner however, is, to plead the St ~~especially~~ specially.

(2)

(1) ~~Not~~ Judge Rowe's apprehends. That the statute provides upon grounds of public convenience, that it is ~~improper~~ impolitic to suffer a man to be called upon for a claim ~~f~~ which ~~has no evidence to exist, but which~~ has long slumbered, inasmuch as it is in most cases difficult to unravel the real merit of such claims. This idea is warranted ~~from~~ by the consideration that all the cases which ~~have~~ come under the exceptions to the statute, proceed upon the idea that the Debtor has waived the benefit of it.

~~(2)~~ The stat of limitations runs against every demand so as to be a complete bar notwithstanding any ~~recovery~~ intervening acts, as ~~the~~ bankruptcy, coverture &c ~~of the parties~~. Lep 148. Ly & vs Mendy 1 Ster 556.

It has been ruled by Just Dennison, that the clause in the stat about merchants accounts extended only to cases where there were mutual accounts & reciprocal demands between the merchants; not to cases between a tradesman & his customers, for those are not merchants accounts: & he was therefore clear of opinion, that the stat was a complete bar. Lep 149. Cotes vs Harris

By the stat of this state it is also enacted, that if any person entitled to any of the said actions shall at the time of the cause of action accrued be within the age of twenty one years, feme covert, insane or imprisoned, such person shall be at liberty to bring the actions within the respective times above limited after such disabilities are removed, or if the Deft be out of the State at the time such cause of action accrued. Stat of N.Y. 564

It has been ruled by Judge Livingston at Nisi Prius, that ~~if~~ the Deft was here at the time the cause of action accrued the absent for more than six years since, yet the stat attached.

The Ky stat differs from ours in one respect. viz There does not allow the stat to attach if the Deft is absent.

Cases in Error 1805. Parker vs Marshall

~~What shall take a case out of the Stat~~

The slightest acknowledgement of the debt has been held sufficient, as to say "prove the debt, "and I will pay you." or "I am ready to account, "but nothing is due you". Lep 152. Yea v Fourike 2 Bur 109; ~~Where is a~~ Per D Mans Comp 548.

~~And~~ What is an acknowledgement of the debt is matter to be left to the jury. Lep 152.

Suing out a process from some court before the six years have elapsed is a method of preventing the Stat from becoming a bar. Ib

And this tho' the process is informal. Lep 153

But it is necessary that the suit should be continued; for though a writ has been sued out yet if there are no proceedings on it, the Stat shall run agt the demand. Lep 154. Lacon vs Lacon 2 Atk 395.

Therefore whenever the Stat is pled in a case of this description, the Plff must shew the interveners in the suit. Ib. Rudd vs Birkinhead 2 Salk 420.

If there are several Co. Obligors & one of them pays interest, the obligation is thereby taken out of the Stat. Lep 152 – Whitcomb vs Whiting. Doug 629.

X When the cause of action is to arise from an executory consideration, as some act to be performed & a promise to pay in consequence of it, then non assumpsit &c is not the proper plea; for the assumpsit does not arise till the consideration is performed. It should be actio non accrevit infra sex annos.

~~A debt found by the Stat of Limitations may be a good petitioning creditors debt. Lep 563 2 Bur 2628. Quantock vs England~~

In the case of Trover the action begins to run from the time of the conversion, for the conversion is the gist of the action. Lep 565. Farnsley 99. Wortley Montague vs Lord Sandwich

The debt of the petitioning creditor in a Commission of Bankruptcy was contracted above six years before the issuing of the Commission. The Bankrupt submitted & it was held that no objection could be taken by a third person, because the stat does not destroy the debt but only takes away the remedy. The same was held in Sherwyn vs Wellington 2 Str 746. P. W. 385 Salk 154. 28. Lep 563. 2 Bur 2628

The Plff relied on a new promise in answer to a plea of the stat of Limitations, which was made by the Deft wife who managed the business, & generally gave orders & paid for goods. Per Buller J. held, that the promise was binding on the Defendant, & took the case out of the stat of Limitations, & stated that the promise of any servant or agent intrusted by the Deft to transact his business for him would have the same effect. Dale Roy vs Fenwick. 2 Lep 311

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Miscellaneous Notes on various subjects.

Interest. At the trial the only question was, whether the Plffs were entitled to interest on the value of goods sold by them to the testator. They were wholesale linen drapers, and the testator an American merchant, & it appeared to have been the usage of the American trade, for merchants here to allow the merchants foreign months credit, & then to charge five per cent. This was hardly disputed by the defendant, & his Lordship held, that though by the Common Law, book debts do not carry interest, it may be payable in consequence of the usage of the merchants in a particular trade; or of a special agreement; or in case of long delay under vexatious circumstances if the jury in their discretion shall think proper to allow it. Per L. Mans. Day 376.

Tenants.

When there is a covenant to repair, the tenant is obliged to rebuild, if the house is burnt down. Hil 1638. Cowgrove 627. 2 Show 401

It may be proper to add, that a lessee for years, tho' there is no covenant to repair or rebuild, is amenable for waste in general; & if a house is consumed by fire, he must rebuild it. And a lessee, who covenants to pay rent, & to repair, casualties by fire excepted, continues liable to payment, tho' the premises are burned & not rebuilt by the lessor after notice. 2 Wood Lec 27. 1 Vesey 462. Contra Hil 621. 1 Dall 312

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Bailment

Bailment is a delivery of goods on a condition express or implied, that they shall be restored to the bailor according to his direction, when the purposes for which they ~~shall~~ have been delivered shall have been fulfilled or ceased.

The person delivering goods to be bailed is called the bailor, the person to whom they have been delivered the bailee. Jones 3. 48: 2 Blk 451: 1 Vern 268. 12 Mod 482. Co Ll 622.

The law of bailment was formerly but very little understood, there was & is considerable contradiction in the books on this subject; yet the authorities are not as contradictory as the dicta of the different Judges. In no branch of the law does rational & sound principle more manifestly govern than in the law of bailment.

Every bailment vests a qualified property in the bailee. 1 Bac 240. Jones 112. Doe & Ste 129. Yelv 172.

By some it is laid down that the pawnee has a special property in the thing pawned, but every bailee has a special property in the things bailed; and Coke when he says that pawnees as contradistinguished from other bailees have a qualified property in the goods pawned, is evidently wrong, for it is clearly demonstrable, that all bailees have that special property in the things bailed.

Was there no authority on this subject, reason would dictate that the bailee ought to have a special property in the goods bailed; for a lawful possession includes a right of possession, which right is a legal right, if this is a right, that right may be enforced, for a right without a remedy is a legal solecism; but wherever there is a remedy there must be an interest, for remedy is only a mean by which interest may be gotten possession of: therefore I think it clearly follows that the bailee has an interest in the goods bailed; it is sufficient if this interest is a qualified interest, but to maintain an action he must have some interest in the bailment. 4 Co 836. or 83b. Co Lit 89. 3 Atk 48. 7 Ju 397. 398. 399: 1 Str 505.

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From the bailees obligation to restore, it follows that he is bound to keep the property according to the terms of the contract, & be responsable if it is lost or destroyed.

It is a general rule that the bailee is not liable unless the loss happened thro' his neglect or default of his. Doe 236. Jones 8.

To determine when the bailee is in fault the nature of the bailment, as well as the bailees conduct, are to be taken into consideration. The nature of the bailment is to be considered to determine whether such particular conduct brings him in fault, for the same conduct in all bailments does not make the bailee liable. Jones 8.

Of the Degrees of Diligence.

The bailee should keep the goods with a degree of care according to the nature of the bailment.
The degrees of care are ordinary, less than ordinary, & greater than ordinary.

Ordinary care is such as every rational & prudent person uses in conducting his own affairs. Jones 9. 10.

To every degree of diligence there is a corresponding degree of neglect, meaning the omission of care or diligence. If the bailee neglects to use ordinary care only; it is called Levis Culpa or ordinary neglect. Jones 11. 13. 31.

What is greater than ordinary care is opposed to that which is less than ordinary neglect, & is what is called Levissima Culpa. Jones 13. 31.

Less than ordinary care is what inattentive & thoughtless persons observe in conducting their affairs; the omission of which is greater than ordinary neglect, & is called Lata Culpa or Culpa Dolo Proxima. Jones 13.
This last kind of neglect is usually accompanied with fraud, but there are instances of gross neglect unaccompanied with fraud, as when the bailee suffers his own property to be lost or destroyed thro the same neglect. 2 Ra 915. Jones 13. 30. 64.

There are three general rules upon this subject

under one of which every question which may arise ought to come, unless thro' a principle of general policy it has been differently determined.

1st If the bailment be solely for the benefit of the bailor, the bailee is liable only for grosse neglect, & no more than good faith can be required of him.
Ld Ra 915. Jones 15. 16. 21. 22. 32. 51. 55. 56. 64. 65. 101. 102.
Contra Coke 83.b

In the above there are one or two exceptions.
Viz.t When the bailee by special ~~neglect~~ agreement makes himself liable for less than ~~ordinary~~ gross neglect
And it is possible that in some other cases he is liable for less than gross neglect. Ld Ra 910. Jones 23 61. 62.

2.d When the bailee is alone benefited he is liable even for slight neglect, which consists in the omission of what is greater than ordinary care. This rule is founded on policy & reason, for it is no more than Justice that he who receives all the benefit, should run all the risque. Jones 15. 16. 23. 33. 89 Doct. & 2 Ld Ray 916. & 917.

3. When the bailment is beneficial to both the bailor & bailee, the obligation is a ballance; the bailee is then bound to use ordinary care & is not liable for less than ordinary neglect. Jones 14. 32 33. 101. 105.

Of the Different kinds of Bailment.

Bailment at Common Law is divided into kinds. 1 Depositum or Depositum, which is sometimes called naked bailment, & the bailee vulgarly called the naked bailee; & consists in a delivery of goods to be kept by the bailee for the bailor without reward. The bailee is called the depositary. Ld Ra 912. 913. Bul NP 72. 1 Pow Con 247. Esp Dig 618. 1 Bac 243. Jones 50. 51.

2 Commendatum. This is a gratuitous loan of goods that are useful & which are to be used by the bailee. The bailor in this kind of bailment is termed the lender, the bailee, the borrower. It is sometimes called a loan for use. Ld Ray 913. 915. 1 Pow Con 249. Jones 50. 89.
This kind of bailment is very apt to be blended with a Mutuum, which is a loan of the same nature but in a

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but in a mutuum the same property is not returned but different property of the same kind, a Mutuum therefore strictly speaking is no bailment, tho the loan is generally gratuitous. Jones 89.90. 1 Bac 241. Doe & Shu 129.

3. Locatio et conductio is a delivery of goods to be used by the bailee, for a consideration moving from him to the bailor; the bailor is called the locator, the bailee the conductor. 1 Roll 913. Jones 30.119. 1 Pow Con 251. 1 Bac 243. Nul N P. 72.

4 Vadium, or Pignoris acceptum is a delivery of goods for a security of a debt, due from the bailor to the bailee 1 Roll 913. Jones 30. 104. Co Lit 205. 4 Com 258. Yelv 178. Esp 624.

5. Locatio operis faciendi is one branch of the fifth kind; this is a delivery of goods to have some act done about them by the bailee for a reward. Locatio operis mercium vehendarum is ~~a division~~ the other branch of this head & is a delivery of goods to be carried for a reward. 1 Roll 17. Jones 144. 120. 1 Pow Con 253. This species includes a delivery of goods to a common carrier, to a private carrier, or other private person, & to a person in the exercise of some public employment. 1 Roll 917. 918. Nul N P. 72. 3: 1 Bac 344. 240.

6. A Mandatum is a delivery of goods to be carried, or some other act to be done about them without reward. The bailee is called the mandatory. Jones 73. 74. 1 Roll 918. Co Lit 1224. 1 Pow Co 254. 255.

With regard to the number of kinds of bailment, authors differ; some make four, some five & others six.

Depositum

A depositum is a delivery of goods to the bailee to be kept without reward, & solely for the benefit of the bailor. The bailee in this kind is only liable for grosse negligence & such as is an evidence of fraud. Doe & Shu 129. 1 Roll 909. 913. 2 Stra 1099. 1 H Blac 158. 1 Powlson 247. Jones 32. 64. 65. 101. 102. Considered in the abstract the bailee is never liable for gross neglect, but only liable for the fraudulent conduct such gross neglect is an evidence of, that is a

strong presumptive evidence Jones 65. 66. 4 Bur 2300. Str 1099. 1 D Ray 655. 914.

To the above rule there is an exception, if the depositary by agreement makes himself liable for less than gross neglect, he becomes bound by such agreement even to making himself a warrantor of the goods if the agreement is so expressed. D Ra 655. 911. 913. 3 Rare by Law 243. 246. 394. Jones 66.

Jones makes the bailee liable for less than gross neglect, if the bailment happens by means of the bailees officiousness in offering to keep them; because by such conduct the bailee is prevented from offering them to any other person of more approved fidelity. This distinction seems to be without sufficient reason to support it. Jones 67.

There have been opinions & some decisions contrary to the general rule as here laid down; for in Southcote's case, it is said, if a depositary take goods he must keep them on his peril. 4 Coke 83b. 6 Ll 815. 6 Lit 89a. By some it has been apprehended that in this case it was the general rule which was determined, but this is not true, for it appears that in this case there was a special agreement between the parties that the Deft should keep the goods safe; this agreement therefore brought it from the general rule under the exception. Besides the plea was faulty & might have been demurred to, for the plea was that the goods were stolen which of itself is no ground of excuse. The Court held a general acceptance makes the bailee liable in all cases when the goods were stolen, & that such an acceptance was an acceptance to keep safely, this however was no further authority than the dictum of the Judges & from this the decisions in the following authorities are founded. Owen 141. 1 Notts 338 Com 133. Nel N P 72. Str 1099. Parm 549.

It has also been held by some authorities that there is a distinction between such agreements when made on a valuable & not on a valuable consideration; & it has been agreed that unless the agreement was made with a valuable consideration, that such an agreement is not binding. But it ought to have been remarked that if the special agreement is made with a valuable consideration, it is no longer a

bailment of this species. The opinion that a valuable consideration is necessary to make the agreement binding, has been exploded by a great weight of authority, & it is now settled that a delivery of the goods is a sufficient consideration. Bac 241. 2 Ra 909. 919. 12 Mod 487. 3 Term Ry 245. 246. 794. Doe & Ha 129.

It has been holden, that when goods were left with a Depositary bailee in a chest which was locked of which chest the bailee had the key, the bailee is liable only for the chest & not for the goods which it contained, because the chest extends only over the chest & not over the goods. Co Lit 89. 1 Bac 337. 2 Cok 83. 84. 3 Atk 47. 12 Hay 911. where the above opinion is denied by Lord Holt who is of the opinion that the Depositary ought to be as much liable for the goods as for the chest, as he has as much power over the one as over the other. Neither of the opinions have mentioned any thing concerning the Depositary's knowledge of what the contents of the chest were, which Mr Good apprehends to be the only criterion by which to determine his liability, for if he is ignorant of the chest's contents he ought more to be liable, unless the goods were lost or damaged by a neglect which would be considered as to the chest proof; for when ignorant of the contents he is bailee of the chest & not of the goods. And even if the goods are destroyed or lost by negligence which would be proof, as to the chest, Good thinks he ought not to be liable for the goods, for the goods had a time to be taking of the chest which would never have been then, which if the depositary had known he might have avoided.

A special agreement & his sapiens were reduced to writing does not object him for the loss or damages at all events as losses by casualty, which is a human invention to control. Jones 62. 63. 4 Co 83.

Also it is laid down generally that they are not made liable by special agreement for the acts of wrong doers. This rule as here laid down in too broad, it must mean the acts of wrong doers when accompanied with violence; for in Southcoat's the goods were taken by wrong doers, & the Deft was subjected to bear the loss. Jones 62-3. 2 Ra 915. 11 Mod Con 248. 249. Doe & Ha 130.

And unless the Depository uses all necessary care & diligence, he is liable for the acts committed by a wrong doer when accompanied with violence. Jones 142.

When goods are distrained for rent the depository is not liable for those goods the goods are a stranger on the ground of being depository, nor for plead, but if the depository refuses to deliver the goods on demand, if he sells or otherwise converts them to his own use, he is liable in an action of trover, unless he can show that they were lost without gross neglect in him; also he is liable in the old Com Law action of detinue, also assumpsit upon an implied promise will lie. 7 Cow 226: 1 Wells 128. 6 H 781.

If Jones if a depository be put to any expense by the thing bailed he may moderately use it, to pay for that expense.

Commodatum

A commodatum is a gratuitous loaning, the used with [illegible] reward, & to be returned to the bailor.

The Bailee in this instance is bound to use all care & diligence possible, & therefore he is liable for slight neglect. Bul N P 72. 1 Powles 249. Jones 91. 1 Bac 244.

If the bailee uses care as much as is required & notwithstanding the thing bailed is stolen from him, he is not liable. 2 Ra 916. 1 Powles 250

It is a general rule that the borrower is in all cases liable for theft, unless he can [illegible] extraordinary care. Jones 6. note 9.

But if notwithstanding extraordinary care is used, the goods are stolen the bailee is not liable, no more than in a case of robbery. Jones 22. 2 Ra 916. 1 Pow 6 251.

If however the robbery had been occasioned by his own carelessness, or by the omission of ordinary care he would be liable.

He is excused when the loss happens thro' inevitable accident; yet even here the mere [illegible] the accidents falling on the goods, he would be liable. 2 Roy 915. 1 Powles 249. 250. Jones 95. 6. 1 Bac 244. 1 Powles 253. 2 Roy 917. 6 J 944. 1 Bac 237.

Locatio et Conductio.

Locatio et Conductio is a delivery of goods usque for hire. Lep 625. D Ray 913.

The bailee acquires a transient qualified property in the goods hired, the bailor an absolute right to the stipend or price for which they are let. The interest of the bailee is like the depositary only strong having a right not determinable at the will of the bailor. Jones 119. 120.

This species of bailment is advantageous to both the parties, the risque ought therefore to be shared between them, the bailee of course is liable for no less than ordinary neglect. Jones 14. 120.

On this subject the weight of opinion is opposed to principle, for Holt says he is bound to use the utmost diligence, if so he is liable for slight neglect. D Ray 916. Prob 251. Bal N.P. 72. This was not the point decided in these authorities, but is a mere dicta opinion of Holt; Prowle & Waller found their opinion on Holt's dicta. Holt makes no difference between the liability of a hirer & a borrower; but if the above dictum of his was taken strictly there could be no difference in their liability. Holt says a hirer is excused for a loss occasioned by theft, but he lays down no such rule with regard to a borrower. D Ray 916. 1 Prob 251. This rule as laid down by Holt is not true but it goes to show he considered hirers & borrowers in a different point of view. Also if the loss happens without any fault paid in the hirer. This is a broad rule, but it shows that Holt made a distinction concerning their liability - for this dictum Holt relies on Bracton 62th folio, where he says a hirer ought to use such a degree of diligence as the most diligent man uses in the transaction of his own affairs; this is in law latin; & it is well known, that in that language the superlative degree is used, when only the comparative is meant. Bracton relies for his authority on the roman jurist Gaius, & Sr Wm Jones says Gaius is the only jurist who uses the term in the superlative degree. Jones 121 & onwards. This being the case Holt's opinion may fairly be laid out of the question, & we are left at liberty to decide the question on the principle

(1) A mortgage of goods without possession cannot exist in point of law. 2 Ta 591. 1 Ld Ra. 168

Accordingly we consulted all the Judges who were unanimously of opinion, that unless possession accompanies & follows the Deed, it is fraudulent & void. I lay stress upon the words "accompanies & follows" because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held fraudulent. Pr Willes 2 Ta 595.

of reason & policy. Besides as our law on this subject is derived from the Roman, & as Gaius is the only one who has reported it as law delivered by Holt, authority is against his opinion, for all other Jurists use the comparative degree. —— The bailee is excused when the loss happened in consequence of Robbery unless it was occasioned thro' want of ~~extraordinary~~ ordinary care. Jones 126.

In case of loss by theft the bailee is liable unless he can prove that ordinary care had been exerted.

Pawn or Pledge

A pawn or pledge is a delivery of goods as a security for a debt due from the bailor to the bailee. (1)

It has been decided that if one delivers goods under an absolute bill of sale, if it appears that by another instrument the pawnor has a right to redeem the goods, such a delivery is a pawn. 1 H Bla 114

A pawn is advantageous to both parties, therefore the pawnee is liable only for ordinary neglect, that is for no less than ordinary neglect. ~~2~~ Ra 917. 1 Pow Con 252. 4 Com 258. Stk 523. Jones ~~[illegible]~~ 115.

It is said in Southcote's case, he is excused if he keeps the goods only as he keeps his own goods. 4 Coke 83.b Co Lit 89. — But this is not law, for he might be guilty of gross neglect as respects his own goods.

In case of robbery he is excused unless the robbery was occasioned by his own carelessness. Jones 111. 109. 61. 107. ~~2~~ Ray 916. 917.

It is said in Southcote's case he is not liable when the goods have been stolen. 4 Co 383.b 1 Roll 237. Palm 551. Yelv 178. Lep 624. 625.

Upon this point the books are contradictory. Jones says he is liable, because he cannot be considered to use ordinary care when he suffers them to be taken by stealth. Jones 61. 106. 7.

Good appendends the question ought to turn upon this point, did he use ordinary care?

Jones seems in this opinion to have deserted his principles & contradicted himself. Jones 92. 109. 115. 138.
Holt is opposed to Jones. D May 918. 1 Ven Com 257. Salk 522. D May 917.
In this case the onus probandi lies on the pawnee, & is a matter of fact, & not, as Jones supposed, a point of Law.

The pawnee acquires a specific qualified property in the goods pawned. D May 916. Jones 112. 3 Salk 268. 1 Salk 522.

This specific property of the pawnee is determined by the pawnors paying the debt, or tendering the sum due; & then the whole interest reverts to the pawnor. 1 Mac 237. 8: 4 Com 258. Br. Ji 2421. Jones 111. Bull Np 92. 4 Co 83.b

After the tender, or payment & a demand made of the goods, if the pawnee still retains them he is a wrong doer, & he is liable for any accident or damage which may happen to them, even for inevitable accidents. Jones 111. 112. D May 917. 4 Co 83.b Salk 523. 1 Ven Com 253. 4 Com 258.

On refusal to deliver the goods the pawnee is liable in an action of Trover, also in assumpsit & Detinue. Br. Ji 244: 1 Com 220. 2 Ven 841. Jones 111. The Law is the same if the refusal is by a servant acting in the regular discharge of his masters business Salk 441. 1 Com 220. Bull Np 92.

The refusal to deliver the goods pawned is an indictable offence at Com Law. This happens only in this species of bailment, & is founded on general policy, such pledges being usually secret, & of course a breach of faith is more difficult to detect than in the other species of bailment. 4 Com 258. Salk 522. 379. Cath 277. 1 Mac 240. 2 Hawk 210.

It is said by Jones that it is laid down by Buller. 72. that if the pawnee refuses to deliver the property to the pawnor on a demand & tender, that the pawnee becomes a depositary of the thing pawned. This cannot be law, neither is it so laid down by Buller. Jones 111.

On refusing to receive the tender, the money becomes the property of the pawnee, because tender & refusal are equivalent to payment; & the pawnor must keep the money so tendered, for the pawnee, being a depository & is liable for proper neglect. Co Ld 364. Ball N P 72. 1 Bac 337. 8. Jones 111.

There are some instances where the pawnee may use the property pawned & some where he may not. This right is founded on the express or ~~implied~~ presumed consent of the pawnor. Jones 112. 113. The pawnee's assent is presumed when the thing pawned is either benefited or not injured by use. If it is made worse by use the constructive consent of the pawnor is excluded & he has no right to use the pawn; & he is liable if he does for any harm that may arise, even if by robbery. 4 Com 258. Salk 422. Co Lit 89. 2 Ray 917.

If the pawn is not to perpense by keeping a pawn, he may use it as a compensation for the expense; and in case of hurt or damage by robbery he is not liable, for his right of using it was derived from principles of justice. Lev 625. 2 Ray 916. Jones 114. Ball N P 72.

By the Roman Law the pawnee was bound to account to the pawnor for the use of the pawn; but by the Common Law he is not bound. Jones 115.

If the thing pawned is made worse by use, & it is not expensive to keep it, the pawnee has no right to use it. Jones 113. 2 Ray 917. 4 Com 258.

If every case where the pawnee uses the pawn, where he has no right to use it, the pawnor can maintain an action of trover; for the use is a sufficient evidence of conversion, in which case the pawnor disclaims all right to the pawn & may recover the whole value. 5 Bac 257. 266. 1 Com 221.

Holt says the same distinctions which run thro' pawns applies to goods found. 2 Ray 917. 1 Powell on 252. This good appprehends to be the true rule. But a contrary opinion is laid down

in Co Ll 219. Lep 599. 1 Bac 243. 1 Leon 123.
When it is reported that a finder is not liable for negligent keeping because no one but the owner is benefitted thereby. Upon first thought a finder appears to stand on the same footing as a depositary: But in a Deposit the bailor has his election to take the goods away at any time; he also selects whom he is willing to trust to be his bailee, but in the case of a finder he has not these advantages; besides the finder volunteers in taking the goods found, & if he will take them he ought to be liable for the omission of ordinary care.
In Cor there can be no ~~recompence~~ question concerning this liability; for a finder by that is recompensed for finding & keeping the goods, therefore it is of mutual benefit to both parties.

In the case in Co Ll above cited, the final decision was right, the decision was that trover would not lie, for this being only a nonfeasance, & trover lies only for misfeasance. Lep 590. Salk 655. 143. 3 Burrow 2827. Hob 255. 8 Co 146.

At Com Law a finder of goods has no lien or encumbrance on them for his trouble in finding & keeping them, & is liable in trover for keeping them after proved to be the owners, altho his trouble & expences have never been tendered him. 2 Blk Rep 1117. 2 T Rla 254. Stra 651.

The cases of salvage are distinct from the

If there could be any recovery at Com Law for finding goods, it must be for the labour & work done about them. Justice Lyes says the court would go as far as they could in such a case. 2 T Rlk 258.
Good appehends that on principle the finder cannot recover for finding & keeping the goods; because the finding & keeping was voluntary, & a voluntary courtesy is not sufficient to found an action of Indebitatus Assumpsit upon. Hob 106. Lep 87. 2 Gs.

A refusal to deliver goods found on demand is not evidence of conversion, for the owner must prove satisfactorily that there are the goods, the

he is entitled to his action of trover. Conversion is an assuming to treat another persons goods as ones own, but a refusal on demand is no evidence of such an assumption. Lep 590. 2 Ralst 312.

If A finds the goods of B which goods C claims as his, & sues A & recovers them out of A, B afterwards claims the same goods, which are actually his, of A, can he recover them? This case never came up in the Eng Courts. On the one hand it appears very hard, that the true owner should be cheated of his rights by a knave; collusion might be practised between them, to defeat the true owner. On the other hand had the finder actually & voluntarily given over the goods to C, undoubtedly he would have been liable, but having resisted the unjust claim, until by process of law he was obliged to deliver them up, it is unreasonable that he should be again obliged to pay them. Gould apprehends that on principle he cannot be a second time liable, for the law ought not to take advantage of its own wrong, & doubly wrong an individual, for the purpose of righting itself. When a false administrator receives the payment of Debts, the Debtors will not be obliged again to pay them to the true one. Also in case of a false will & false execution. And Gould thinks it to be a general rule, that when a person has once paid money over by process of Law, he cannot by law be obliged again to pay that money, altho the first payment was wrongful. 1 H Bl 669. 682. 2 H Bla 460 n. 1 Ld 8. Cook B Law 370. Doug 161. 3 Ter 125.

The pawnor, after tender & refusal of the sum due, may bring his action of trover & recover the value of the thing pawned; the pawnee is also entitled to the money tendered, & after he had demanded it he may recover it on the original contract action. 1 Ralst 29. 31: 1 Bac 238.

If perishable goods decay whilst in the pawnees possession, the pawnee has still a right of action

against the pawnor, for the debt, the goods being no more than a security for the debt. Yelv 179. Co Lit 209. Salk 523. 4 Com 258. 9.

In any case the pawnee may sue the pawnor & recover his debt unless there is a special agreement subsisting between them, that the pawnee shall rely on the pledge for his security. Str 9 & 719. 2 Lev 116. 8 Sp 86. Yelv 179 & 4.

If the goods are lost or destroyed by the fault of the pawnee, which fault is ordinary neglect, it seems to be a rule, inferable from what is laid down, that the pawnee's debt is extinguished. There is no direct decision to this point, & altho it may be inferred yet it appears not a reasonable rule, for the pawnee is also liable to the pawnor for losing the good. The above rule is to be inferred from the following — Jones says that if the pawn is lost without the fault of the pawnee the debt is not extinguished. Holt says it down, that if the pawn is ~~lost~~, altho no diligence has been exerted the pawnee does not lose his debt. It is laid down ~~argued~~ by counsel, that if the act of God the pawn is ~~lost~~ is destroyed, ~~still~~ the pawnee may recover his debt. Jones 106. 7. D Ray 917. 3 Mod 1594.

A factor cannot pawn the goods of his principle so as to give his pawnee a lien upon the goods as against his principle; this rule however does not apply when he uses the goods in his own name — because a lien is a personal right which cannot be transferred. The principle on tendering the factor what is due to him has a right to the goods, & can maintain against the factor pawnee. Str 1178. 5 Ter 64. 1 H Bla 362. 4 Com 227.

~~The principle~~ If the debt for which the thing is pawned, is not paid at the time the pledge becomes due, in law the pledge becomes the absolute property of the pawnee. But he can by application in equity obtain the equity of redemption. Str 1178 & 1 Ver 86. Co Lit 205. 3 Atk 395. 2 Ver 691. 698.

An agreement that the pledge may be sold if not redeemed at the time specified, does not bar the right to the equity of redemption, unless the agreement further states, that the party shall have no further equity of redemption. 1 Bac 238. 1 H Blk 114. 2 Ven 690.

The pawnee after the day of payment, may immediately sell the pawn, which bars the pawnor equity of redemption. Co Lit 205.

Judge Reeves is of the opinion however, that if the pawnee sells the pawn for more than the debt for which it was pawned, that the pawnor in Equity can recover the overplus.

Comyns says the pawnee may before the day of payment assign over the pledge. 4 Com. 258. 9. Owen 124. 1 Vern. 350: 1 Salk. 29. This rule is opposed in Co J. 244. 8 Yelv 178.

On principle it is manifestly wrong, for it is settled that a lien cannot be transferred, & before the day of payment the pawnee has no more than a lien upon the pledge. 5 Ter 606.

Neither can a pledge be forfeited by any act of the pawnee; but it is settled that whatever a man can assign is forfeited. 1 Bac 228. Co Lit 8: 12 Co 12. Co Car 556. 1 Roll 100: 2 Bac 376. 7.

It is also laid down in Brook, that a pawn is not to be aliened before the day of payment; by which is undoubtedly meant, it cannot be assigned. 1 Vern 355

Again a pawn cannot be taken in execution for the pawnors debts; but it is settled that whatever can be conveyed can be taken in execution. 1 Bac 230.

Neither can a pawn in the hands of the pawnee be attached; from all which it appears to be a principle founded on reason, because the pawnor may be unwilling to have trusted the pawn in any other than the pawnees hands; besides it may be dangerous as the assignee may be a bankrupt.

In Vernon there is a case reported which at first sight seems to justify the case in Bongens, but on examination it will be found not to support it. The case is; a pawnee pawned the pledge to a third person, for more than the pledge

was pawned to him; - The pawnor brought his action to have a decree against the third person, but it was determined that he must pay what the third person payed for the pledge, or else not recover; but in this case the bill was brought after the day of payment & therefore the decision was right. But if the action had been brought before the day of payment he ought undoubtedly to have recovered the pawn on paying what he pawned it for. 2 Vern 691. 8.

If the goods of the pawnor are forfeited, his right in the pledge is also forfeited; but government to obtain it must pay the pawnees debt. Yelv 179. 4 Com 259. 1 Bulst 259.

If it is established that if A delivers goods to B as a security of a debt due from A to C, C becomes pawnee for the goods. The rule ought to be taken with this ~~exception~~ qualification viz that C is privy to & consents to it. 1 Bac 230. 239. 2 Leon 30. Lep 576. Bull N P 35.

If a delivers goods to B as a naked donation for C, if B chuses he may recover the gift before C has actual possession of them; because it is given on no consideration. And if B is not an agent of C there is not a sufficient delivery, the given on a valuable consideration. 2 Sha 995. 5 Bac 260. 1 Bac 239. Lep 577.

If A gives goods to B without a delivery, A can after demand made recover them back again; such gift only excuses B from any liability for taking, but not for keeping. Sha 955. Lep 577.

If no day is fixed on which the pawn shall become the property absolutely of the pawnee's it was formerly held, that unless it was redeemed during their joint lives, it can never be redeemed. But it is now settled, that the pawnor, if the pawnee is dead may redeem the pledge. 4 Com 258. Co J. 244. 5. Yelv 178. 1 Bulst 29. 2 Co 79.

If a pawn is delivered to a stranger without a consideration by the pawnee, the pawnor by tendering to the executor of the pawnee, may recover the pawn from the stranger in an action of trover. 1 Bac 238. Co J. 244.

And if the pawnee deliver it to a stranger on

consideration; the pawnee by tendering to & demanding of the pawnor's executor, may recover out of the stranger in an action of trover; for this case stands on the same principle as whether the pawnee may after the pawn before the day of payment, but it has been proved he may not after. 1 Bulst. 29. 6 J. 244. 1 Vez 239. 4 Com 258.

The reason why the life of the pawnor is the time limited when there is none limited by the parties is because a pledge is considered personal as to him; besides some limits must be fixed & these appear the most reasonable. Bacon apprehends that Chancery would grant a right of redemption after the pawnors death, unless it was the intention of the parties that the pawnors death should bar the redemption. 1 Vez 239 note.

If a day is fixed & before the day the pawnor dies, the right of redemption is not forfeited by his death. 1 Vez 239.

Locatio Operis

This is a delivery of goods to be carried, or some other act to be done about them, & is always for a reward. The delivery may be to a private carrier, or other private person, either in a professional capacity or not; or to a public carrier or some other public person in their public employment.

First of delivery to private persons. This may be to a man in his private professional character or otherwise, as cattle to an agisting farmer. 2 May 618. Jones 129.

But a delivery of precious metals to a Jeweller to be worked into rings or utensils, is not a bailment of this or any other kind, but is the mutuum of the Romans. The goldsmith is therefore liable at all events to the person who delivered the metals, because as it is with wheat made into bread, grapes into wine, so when metals are by fusion & the

workmanship of the mechanic changed in form, they cannot be specifically restored, & they are intrinsically of such a quality that they cannot be identified. Jones 143. 2 Bla 408. Rep 38.

This Bailment is mutually beneficial, therefore according to the rule, the bailee must be bound to ordinary diligence, consequently liable for ordinary neglect & on the decisions. D Ray 918. North 254. 1 Roll 4. Jones 128. 2: 12 Mod 487. Jones 14-22. 82-133-4-8.

Robbery will excuse a bailee of this class, unless it can be shown he contributed to the robbery by ordinary neglect. Co Lit 89.a Holt N 131. Mon 462. 4 Co 84.a D Ray 918. Jones 129-130-8.

It is law a bailee of this sort is not liable for theft, when the goods stolen were locked up with a reasonable care, & so says Jones which contradicts his former assertion "that goods cannot be taken from one by stealth, but this a want of ordinary care. Jones 138. 1 Vent 121. 2 Lev 5. D Ray 918. 1 Roll 4.

If the goods are bailed for the purpose of having some work done about them, which is partly performed & they are then lost or stolen in consequence of the bailees ordinary neglect, the bailor will not be liable to pay for the proportionable performance of the work - because by means of that neglect he receives no benefit from that work. 3 Bur 1562. Esp 86.

When landlords have a right to distrain for rent, all the goods, whether the tenants or not, are subject to this right; therefore the goods bailed may be distrained: if they are the bailee is answerable for them; for at least it is ordinary neglect for him not to pay his rent, & then suffer his goods to be distrained, & this would be the case in all bailments mutually beneficial.

But it is presumed the suffering goods to be distrained does not amount to gross neglect, therefore when the bailment was beneficial to the bailor only, the bailee gross such would not be liable; unless there were some peculiar circumstances attending the distress, as conveying his own goods off the premises & leaving his bailors. But without this he would be liable to the bailor in an action of Indebitatus Assumpsit. Jones 141-2.

When goods are delivered to a professional character to do some act about them in his professional capacity as cloth to a tailor to be made into a

(1) Lord Holt decided that an action did not lie against the owner of a Stage Coach for a trunk that was lost, when he received nothing for the carriage of it. And altho' money was given to the driver to take care of it, yet that was decided to be a mere gratuity to him, with which the master had nothing to do. In this case the owner took a seat in the Stage Primerg. 1 Salk 282. Middleton vs Fowler.

garment, he is under a two fold obligation. 1st. To keep the goods with diligence amounting to ordinary care. 2ndly, To do the act about them in a skilful & workmanlike manner. But if goods be delivered to a man to do some act about them not in his professional capacity, he is under no such liability to work with skill only by special agreement. 1 Cooke 54. 3 Blk 155. 6. 1 Saund 324 Sup Ord. 130. 140. Jones 132. 128. 9. 137. 2 140.

A Bailee of this sort is not liable for losses occasioned by fire, unless not on by his ordinary negligence. Ordinary care not being generally sufficient to prevent losses by fire.

Secondly of delivery to public persons.

1st Common Carriers.

(1) A Common Carrier is any one who makes it his regular business to carry goods for others, for a reward. As a waggoner, a stage driver &c. D Ra 918. 1 Bac 343. Co Lit 89 a 87. 1 Ro 27. Hob 18. 6 Bac 330. 1 Com 212. Jones 150. Sup 619.

It seems formerly to have been doubted whether any but land carriers could fall under the denomination of Common Carriers, but it is now settled that a ferry master, a ferry man, & a master of a ship are equally Common Carriers & subject to the same law as Land Common Carriers. Str Ray 220. Jones 152. 149. 1 Burr 190. 238: 12 Mod 487. 6 T 330. 1 Com 212.

Tho under the Eng Statute, the owner of the vessel is liable for no greater loss than the value of the vessel & the freight to be received; Yet if the loss have happened thro' the negligence of the master of the ship — the master will be liable to the extent of the loss. Salk 440. Carth 62. 1 Show 29. 201: 1 Ro 18. 70.

Ship owners as well as the owners of the ships are liable for their default to an action of trespass on the case. 5 Ro 651.

If a carrier refuse to carry goods, having conveniences thereto & the usual price is tendered, he will be liable in an action on the case. Bul. 70 3 Bac 186. 2 Show 327. Hard 163. 3 Blk 166. 1 Ba 344. 9 Co 87.

But a carrier may make a special exception by a general advertisement describing the mode & terms on which he will carry, & he will be bound only according to the terms of that advertisement. Sup 622.

4 Burrow 2298. 2 Show 327.
A special acceptance without a general advertisement would be binding

This being a species of bailment mutually beneficial, according to the general principle, the bailee would be liable only for ordinary neglect. And so formerly was the law considered. But it is now settled, on the ground of public policy, otherwise. Strangers being frequently obliged to hand their property to carriers, it became necessary to oblige them to be answerable for all accidents but those which arose from the acts of the bailor, of the Public Enemies, or the God. 1 Roll 345. Jones 144. Co Lit 89a. Moor 462. 1 Roll 2. 2 Ray 918. 1 Powle 253. 2 Holt 131. Salk 143. 2 Co 84a.

But a Common Carrier cannot be said strictly speaking to be liable to this kind of responsibility as bailee, but as a public Character. 2 Ray 918. 3 Bur 1598. Str 128. 1 ~~Ray~~ Str 27. 1 Will 281. Lsp 619. Roll 74.

A Common Carrier if he carry gratuitously, is liable only for gross neglect, Inasmuch he is not then a common carrier, but a Mandatory. Carr. 485. Lsp 621.

A Common Carrier is in the nature of an insurer against all contingencies but the act of God, of public enemies, & the acts of the bailor. Bul 70. 1 Will 281.

Of the Acts of God.

The legal definition of the act of God, is according to Lord Mansfield, the happening of such an event as could not be brought about by the intervention of man. 1 Term 334. Str 128. 2 Hen Blk 113. Dyer 66b.

It has been adjudged that fire occationed otherwise than by lightning is not the act of God. But a fire occationed by a subterraneous eruption, or a subterraneous fire would doubtless be considered the act of God, for the intervention of man could not cause such a fire by such means. 1 Ter 34 Dyer 66b. Lsp 620. 2 Hen Blk 113.

It is said <u>inevitable accident</u> does not excuse a carrier of this kind. <u>Inevitable accident</u> may be thus distinguished from the act of God, it being

that against which any practicable degree of human prudence could not have guarded. Therefore the act of God will always be inevitable accident, but inevitable accident, will not always be the act of God.

When the proximate cause of the loss is caused by the act of God, there being no want of care or caution on the part of the carrier, he will be excused. As when goods are thrown over board in a storm to lighten the ship. But when goods are thus thrown over, the law merchant is, the passengers, master, & all others interested in the vessel's safety shall contribute in proportion to their interest to bear the loss. 12 Co 63. 2 Roll 567. 2 Bulst 286. 1 Bac 945. Aller 93. 1 Holt 479. 3 Bac 934.5.

If a rat gnaws a hole in a vessel, whereby the goods are injured, the carrier is not excused, because the act of the rat is not the act of God. Jones 147. Holt 70. 1 Will 28.

When the carrier exposes the goods to the act of God thro' his ordinary neglect, he will not be excused. So also I presume when he thus exposes them to public enemies. Str 120. Lep 620.

Of the acts of public enemies

The act of public enemies is here understood in its more common signification. Therefore the acts of rebels or insurgents, the acts of foreign pirates (otherwise of the pirates of the seas) or acts of robbery will not excuse. 1 Ter 18. 1 Vent 239. 190: 1 Mod 35. Lep 620.

Of the Sailors Acts.

A common carrier would be excused on this ground when employed to carry casks of liquor which burst in consequence of the fermentation of the liquor; for it is the sailors own fault that the liquor was caused in such a state. Hob 74.

So when the owner of goods will have the boatmaster to overload the boat as he sinks it, it is his own fault. Lep 621: 2 Show 127. 1 Bac 344.

To charge the carrier qua stack for the loss of goods, they must be lost while in his possession or under his immediate care. A request to a third person by the bailee, that he would see to the goods in a friendly way, would not release the carrier. Bul 70. 2. Lev 327. Stra 690. 1 Holt 17. 6 Js 330. 1 Rolle 12. Lep 621. 1 Rolle 2.

The the carrier knows not the contents of the box, yet he is liable therefore according to the general law upon this subject, unless he have made a special acceptance. Bul 70. Jones 148. Stra 145. Carth 485.

So also when the a carrier is misinformed as to the contents of a box, he is still liable according to the decisions, unless he has made a special acceptance. Allyn 93. Bul 70. 1 Vent 238. Doe & Sh 130.

Lord Ellen thinks these decisions were ill founded & that a carrier ought not in such case to be liable only for the box & so much of the contents as he was informed of, & for the same reasons that he thinks a depositary ought not to be liable in such a case. 2 And indeed this opinion is in some measure supported by a decision, as well as by common sense & sound policy. H Bl 290. 3 Keb 135. 1 Lev 213. These decisions he thinks fairly overruled by subsequent decisions. L Mansfield & the whole bench condemn them. 4 Bur 2300. So also does Lord King Stra 145. As does Sr Wm Jones. Jones 148.

There need be no particular communication between the owner of the goods & the carrier to enable him to make a special acceptance; for the public advertisement is sufficient when the circumstances are such that it can be inferred that the bailor knew of it; as when he took the paper containing it; but if this cannot be inferred, & the carrier did not inform ~~the~~ him, the acceptance is a general one. Bul 71. 4 Bur 2298. Lep 622. Carth 485.

On a special acceptance the carrier will be liable only to the extent of that acceptance, therefore if more articles in quantity or value are palmed upon him than he knew of, he will be liable but for those he knew, ie what he agreed to carry. Lep 622. 621. Carth 485. 4 Bur 2300. Carth 485

But Gould thinks as in the case of a deposit in the case above, the carrier ought not to be liable to any extent whatever for those goods than he was aware of, & not for those that were fraudulently palmed upon him. 1 Hen Blk 298. Lsp 622.

It is holden that a person carrying passengers shall not be liable as carrier for their baggage, provided he never [illegible] nor contracts either expressly or impliedly to carry any. Cow 25. Salk 282. Mod Ws 70. 1 Bac 343. Lsp 622.4.

To charge the carrier according to the general rule, it is not necessary the goods should be lost in transitu, for he is liable until they are delivered to the consignee, or where it is customary for the carrier to deliver them. Even when it is not customary for that carrier to deliver the goods to the consignee, he is still prima facie liable, for the onus probandi lies upon him to show that the custom is not to deliver them to the consignee. Then he is no longer liable as common carrier, tho he will still be liable to keep them as the first species of the fifth kind of bailment. 2 Blk R 916. Cowen 57. 3 Will 429. 4 Ter 581. Lsp 623.

When ship owners are liable to a suit as common carriers, they must all be joined if their liability arises ex contractu. Salk 440. Lsp 623. 5 Bur 2611. 5 Ter 651. But when they are liable thro' the neglect of the master, that liability arises ex delicto, & they may therefore be sued either jointly or severally. 5 Ter 651: 4 or 5 Bur 2611. This decision is also reported in Salk 440: 3 ~~Blk~~ Salk 213. That for the neglect of the master of the ship the owner if sued at all must be sued jointly, is overruled; & therefore the proposition that the omission of suit joinder may be taken advantage of under the general issue is untrue; indeed it would be in case that decision was not overruled for it could be taken advantage of only by plea of abatement. 5 Bur 2611.

Post Masters

Post Masters at common law were liable like common carriers. Jones 133.

But now being under statute regulations, & it being a governmental establishment, they are no longer considered as com carriers & are subject to a widely different law. Neither can they come within the definition of com carriers

for a person putting a letter in a Post Office makes no contract with the post Master, if he contracts with any one it is with Government; he pays the post master nothing for he receives his salary from Government. Nor on a principle of public policy would it answer to make a post master liable to the extent of the Common Carrier. Salk 17. 2 Ray 646. Cowp 754. Jones 153.

But a post Master will be liable for his own default, tho not for that of his subordinate officers. 3 Will 443. Cowp 765. Common Carriers are said to be liable upon the custom of the Realm, & upon this they are declared against. The custom of the Realm & the Common Law are the same thing. 1 Lid 245. 2 Raym 485. 6. 1 Ray 343. 3 Ray 130. Hob 18. 3 Mod 387. 1 Fer 33. 3 Mod 227.

The remedy against Com Carriers is by a special action on the Case, unless they have been guilty of an actual misfeasance amounting to conversion, & then trover will lie, tho not against him as Common Carrier. 6 Lid 446. 5 Bur 2827. Salk 555. Lev 590. Hob 251.

Inn keepers.

Any person who makes it his business to entertain lodge & provide necessaries for travellers & their horses, is an Inn keeper. 1 Ray 179. Pam 74. 2 Roll R 345.

In Com In keepers are appointed by a certain way prescribed by Law. Stat Com 208. In Eng any person may assume the employment of Inn keeping.

Inn keepers considered considered as bailees come under the 2d species of the 5th kind of bailment, because they are public persons in a public employment for a reward. In keepers have other liabilities than as bailees, but they come not properly under this head.

This kind of bailment is advantageous to both parties, & therefore according to the gen principle the inn keeper would be punished only for ordinary neglect. But the rules of policy have extended his liability, yet not as far as Com Carriers. This extension of liability is of course an exception to the general rule. Jones 153. 4 135.

This exception is founded on good policy, & is for the purpose of preventing those impositions which many times might be practised upon travellers for a traveller is not able to learn who is the most honest Inn keeper, but when night or fatigue overtakes him, the

he must commit himself into the hands of strangers, & being thus thro' necessity thrown in their power, an Inn Keepers responsibility from that consideration ought to be increased beyond the general rule. Their liability is greater than a private bailee of the fifth kind.

It is a general rule that the host is always liable for losses occasioned by his servants, because he is bound to keep honest servants. Lsp 626: 8 Co 32. 33. Bull NP 72. 168. 430.

At all events the host is liable for the goods of his guest which are stolen by a stranger. Br J 224. 8 Co 33a Jones 134. To this rule there are two exceptions. If they are stolen by the servant or companion of the guest, the Inn Keeper is not liable. Cro El 285. 3 Bac 183. 8 Co 33a Lsp 627.

So also if they are stolen by the person the guest desires to lodge with him, the host is not liable. 1 Com 211: 8 Co 33

The host is liable for common robbery, of course he is bound to more than ordinary care. Jones 135. 3 Bac 182 8 Co 32.

It is reported by Plowden that if the Inn is taken & the goods taken by the kings enemies, the Inn Keeper is excused. Plow 9. From this it would reasonably be inferred, that for any other human force, the Inn Keeper would not be liable, but the rule is not so rigorously laid down. For it is said by Jones that a force truly irresistible will excuse the Inn Keeper. Jones 135.b

If this is law other force, besides that exerted by the kings enemies will excuse under certain circumstances. Plowden says the reason why Inn Keepers are excused in case of the kings enemies is, "because in reason such force cannot be resisted". Therefore he impliedly admits the rule as laid down by Jones.

If robbery be committed by such a number, as in reason is could not be presumed the Inn Keeper was able to resist, he is excused.

The Inn Keeper is not liable for losses happening by inevitable accidents.

It is laid down by Coke, that Inn Keepers are not liable unless for some default in themselves, or their servants. This rule is contradicted by Bacon who says a default is not necessary to be shown to make them liable. 8 Co 33a Lsp 626.7. 1 Com 211.229.

Gould apprehends Cokes Idea to be, that when the law makes the innkeeper liable, he is in default, & therefore the contradiction between him & Buller is only verbal.

1 W. Raves is of the opinion, that an Inn keeper ought to be liable to the extent of common carriers; & indeed the same policy applies equally. But the books do not warrant his idea.

The Inn Keeper is liable only for such goods as are Infra hospitium, this includes all goods in barns, & stables, as well as those which are in the mansion house. 8 Co 32. Lep 626.

If the goods are moved from the Inn by the direction & operation of the guest, the host is not liable for any loss they may sustain, but if they are removed by his own direction he is liable. 1 Rolle R. 1 Com 210. Bull 73. 4 Co 32.

If the guest orders the Innkeeper to put his horse in the pasture from whence he is stolen, the Inn keeper is not liable; for the horse was not removed from the curtilage or home by the hosts order. 4 Co 32.

Mandatum

Mandatum is a delivery of goods to a bailee, for him to carry, or to do some other act about them without a reward. Bull N P 73. 1 Pow Con 254.
This kind of bailment is sometimes termed acting by commission But commission is not strictly a proper expression, for it generally carries with it the idea of a reward. Jones 73. The distinction made between a Deposit, & Mandatum is, that a deposit lies in custody; Mandatum in feazance. A deposit is to keep; a mandatory is to carry the goods bailed. This is the only characteristic difference between the two bailments.

This bailment is for the bailors benefit, therefore according to the general rule, the bailee ought not to be liable except for gross neglect; & so the rule is established. Jones 74. 2 Ray 909. 919. In which is says the bailee is liable only for deceipt. 1 Pow Con 255. 1 H Blk 155.

When the bailee makes an agreement, that he will use all necessary care or skill; he is then liable only according to the terms of the contract. 1 Bro 6 255.
-D Ray 909. This engagement to use ordinary care, is frequently implied from the nature of the goods carried. 1 H Blk 161. 162. Jones 74.

Jones says that when the bailment lies in feasance, & work is to be done about the bailment, such a degree of diligence is implied as is sufficient to carry into effect the undertaking. Jones 73.
This Judge apprehends to be too wide a rule to be supported, he thinks the authorities do not countenance it.

When there is no agreement express or implied, to use the bailment other than his own, he is liable only for gross neglect. 1 H Blk 158.

No agreement is ever implied, unless the bailee is to do something with the goods in the way of his profession. 1 H Blk 158. 3 Blk 165. 6. As when a Tailor agrees to make a garment gratuitously. This rule is approved by Jones, but is questioned by the case of Coggs & Bernard. D Ray 910. Jones 04. 5. 7.
The implied agreement extends to the feasance or doing of the work, but never to accidents or foreign causes. This proposition is supported by Holt, when he says, if a Carry man had pitched the cask & spilt the brandy, the bailee would not have been liable. D Ray 918. 1 Brooke 255. 2 Mod 73.

A mandatory may make himself liable for casualties; not however on the ground of gross neglect, but by special agreement. D Ray 910. Jones 75.

When the bailee contracts to carry the goods safely it is said he must carry them at his own peril. Judge thinks such an agreement does not make him liable in casualties or robbery. D Ray 915.

A Mandatory cannot exempt himself from fraud by an express agreement; because such a contract would be void, being contra bonos mores. Jones 75. 66.

It is said by some that the action must be brought against the bailee, on the ground of defaults. But it is greatly clear that the action may be the gravamen may be founded on contract. D Ray 909. 919. 5 Ze 143.

It is objected by those who hold the action cannot be founded on contract, that the receiving the goods is not a sufficient consideration. But Holt says, that the receiving of goods is a sufficient consideration on which to found an action of contract; & Gould apprehends it to be agreeable to the law of contracts. 1 Bac 241. Dav Ch 129. 12 Mod 487. 3 Burr by Law 245. 394. 5 Ter 149. 150. Ylo 4. 128. Br Jac 6 678. Hag.

Jones says, the ground of action is the special damage; but it is sufficient to show that the mandatory broke his agreement, for if he is not bound on the promise as a promise, the promise cannot extend to his responsibility. 5 Ter 149. 150.

Jones says, if the bailee after agreement made, refuses to take the bailment, they that mean the goods are damaged, the bailee is liable. Jones 76. 74 80.
This rule is contradicted in Ter 149. 150.
If however the agreement is made with an intention of committing fraud, the bailee is liable in an action of fraud. 3 Ter 51.

How far Bailees have a Lien on property.

A bailee has never any lien upon property, unless he be bailee either of the fourth or fifth kind.

A lien is a direct claim to, or some encumbrance on the specific property of another; arising for a security of some debt or duty. Therefore as there is no debt or duty, a Hirer, a Borrower or a Mandatory, they can never have any lien upon the goods.

There is not a lien upon the goods in every instance of bailment of the fifth kind; but pawnees have always a lien created upon the delivery of the goods to them, & this lien extends to such time, as that the money be paid him. 2 Com. 258. Br Jac 244. 5. Salk 522. Br Ch 419. Esp 583.

Most bailees of the fifth kind, are entitled to a lien until paid for their trouble. 3 Bac 185. Hob. 42.

There is a difference between the lien of a pawnee & a bailee of the fifth kind in two respects; first when goods are pawned, the pawnees lien is completed upon the delivery of the goods. The bailees of the fifth kinds right

is not completed, until he has accomplished what he contracted to perform. Second - In a pawn the lien is created by the Contract of the parties. In bailments of the fifth kind the lien is created by a condition in Law. A Common Carrier has a lien upon all goods until paid for carrying them. D Ray 752. 867. 5 Mod 202. Salk 654. 5 Mod 269.

If goods are stolen & delivered to a Com Carrier who conveys them according as directed, he may detain them even against the true owner, until paid for carrying them.

The Inn Keeper has a lien upon the horse of his guest, not for the food for the guest, but for the horse. Lep 584. Bul NP 45. 1 Bals 268. 8 Co 147. 2 Show 161. 3 Mod 183.

The Inn Keeper may detain the person of the traveller. Good apprehends by this rule, that he may detain the person for the whole bill, & therefore is not obliged to resort to his lien upon the horse, or other goods for any part of the bill. 2 Rolle 85. Show 269. 3 Mod 185.

If a horse of a third person is left in the hands of an Inn Keeper, he may detain him even against the right owner until paid for his keeping. The same reason prevails here as in the case of Common Carriers. Viz Because the Inn Keeper has no right to refuse to keep the property. Yelv 67. Pop 128. 179. 3 Mod 185.

If however the Inn Keeper once lets the lien go out of his hands, it is forever gone; tho' the debt remains. Lep 584. Stra 557.

A Tailor has a right to detain the garment until paid, & this good apprehends is equally applicable to all Mechanics. 8 Co 147. a Hob 42. Yelv 67.

This arises from a condition in law, not from any express agreement; it is for the promotion of trade & commerce.

An agisting farmer has no right to detain the cattle which he keeps, for here neither of the foregoing reasons operate. Bul NP 45. 8 Co 147. 1 Mod 240. Lep 585.

In no case when a bailee relies on a special agreement for his pay, has he a right to a lien; & it is held, that an agreement to pay a sum certain, is sufficient to oust his right to a lien. Lev 224. 4 Mod 271. Yelv 66. 2 Rolle 92. Lep 585.

A factor has a lien on the goods of his principle when in his possession, until the debt is paid. 3 Fr 169. 1 Atk 254. 4 Com 228. 2 Wilk Rep 1154. Lep 100.

If the factor once resigns to his principle the possession of the

goods, his lien is given lost. 1 Bac 493. 4. 1 Com 228
This lien is also created by operation of law.

A Hirer or Borrower altho' they have no lien upon the goods, yet they have a right to hold them until the business for which they were hired or borrowed is accomplished. 1 Bac 240. Yelv 172. 1 Roll R 128.

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How Strangers rights are affected by bailment.

It is laid down by Rolle & cited by Bac – that if one bails the property of another, the bailee is bound to deliver it to the bailor, altho the right of property is in another. 1 Roll 607. 1 Bac 237.
This rule good appertains not to be law in the full extent which it is laid down, & that it only means, that if the bailee redelivers the goods before any action is brought or after action but before Judgment obtained by the true owner, he will be exonerated all liability to the true owner. This is in substance afterwards so laid down by Rolle; from which may be inferred that should the bailee deliver the goods to the true owner he will be justified. Fitz N B 137. 1 Bac 242. 2 Ld Ray 867. Sp 599.

An he cannot deliver goods to the true owner, & would not be justified should he deliver them to the bailor.
The reason given is, because as he came in possession of them by operation of law, he ought to deliver them to him who has the lawful right. This good think, a righteous rule; because many times it may happen that he supposes the bailor the true owner, & under such supposition would deliver the goods to him. 1 Rolle 607 1 Bac 237.

When the true owner applies to the bailee for his goods he must exhibit sufficient evidence of ownership, else the bailee would not be liable for not delivering them to him.

A Stranger may purchase or a creditor may levy property in the possession of the bailee, belonging to the bailor. There are several English statutes regulating these proceedings, two of which are in affirmance of the Comm Law & therefore considered as law in this country. The first was created in the 13 Eliz by which it is holden that if a purchaser leaves goods in the vendors possession, & creditors supposing them to be the vendors levies upon them, they will hold them in exclusion to the first purchasers right, for in this case the purchaser is supposed

fraudulent, & made for the purpose of defeating the creditors rights. Such practices give the vendee a false credit, enabling him to hold out false colours & plenty contract debts which he is totally unable to pay. 1 Co 80.b 2 Fr 587. 595. Cowp 432. 1 Atk 180: 7 Fr. 71.

If then contracts the vendee acquires no property as against creditors, therefore they are not strictly bailment.

If the want of possession is consistent with the deed of sale, the sale is not of course fraudulent be cause the presumption of fraud is rebutted. 2 Fr 595. 6. 7. Cowp 432. Sp 541. Atk 167. When immediate actual possession cannot be given, as of a Ship sold when at sea, such contract is not fraudulent. 2 Fr 462.

The Bill of sale in such a purchase is a symbolical delivery of the Ship. 2 Fr 445. 6. 1 Vez 365.

This Stat relates only to creditors. Cowp 434.

Coke says this stat relates only to subsequent ~~stat~~ creditors. Co Lit 290. 2 Co 82.

But he cannot be correct, for by the means of hanging out false colours, the vendee is as much enabled to defraud subsequent as antecedent creditors, & so D Mansfield has determined. 2 Fr 595. 7. 7 Ath 71. Contra for Coke opinion see 3 Co 81.

The 13 Eliz is affirmance of the Common Law is 21 James 1. by which it is enacted, that if a person become a bankrupt, who holds in his possession order & disposition goods of another person, & by consent of the owner, such goods shall be subjected to the payment of his debts. Sp 566. 1 Atk 166. 1 Vesey 348. 7 Fr 228.

This property is a bailment, for the stat extends over the goods bailed, as well as those which are sold to the bankrupt, & it was made for the purpose of including all such cases as the stat of Eliz did not include. Cowp 232. 233. Sp 566. Under this stat creditors take not on the ground of fraud, but on the ground of false credit being held out by the bankrupt bailee, therefore if fraud is rebutted it destroys neither the antecedent nor the subsequent creditors rights. 1 Atk 180. 3: 1 Vesey 360. 6. 8. 370. 2: Sp 566.

This stat extends equally to mortgages as to absolute sales. 1 Atk 165. 1 Vesey 348. 9 Ritts 260. Sp 566.

A bill of sale on a condition precedent to the vendees right, good appprehends ought not to prejudice the right of the vendor.

A Bill of sale of a Ship at sea, comes not within the statute. 1 Atk 160. 1 Vesey 354. 361. 2: 366: 2 Fr 466. 485. 491. Sp 567.

Actual manual possession is not always necessary to take goods out of this Stat. 7 Ter 71.

The bankrupt must possess the goods as he possesses his own goods to bring them within the Stat so as to cheat the true owner.

A Temporary possession for a particular purpose does not bring them within the Stat. Com 233. 3 Ter 366. 1 Atk 185. It is necessary the Bankrupt should appear to be the true owner to bring the goods within the Stat; for if a factor becomes a bankrupt the goods of his principle would not come within the Stat. 1 Atk in case of ~~Gold~~ Gold Smiths. 1 P Wm 318. 1 P W 185. Sep 571.

The two Stats above recited, are made only for the benefit of creditors, there is another made in the 21 Ly in favour of purchasers, & puts them upon the same footing as creditors are placed by 21 Jac 1 & 13 Ly. 2 Rac 602.

The decisions in this State are generally in substance conformable to the decisions on the ~~Stat~~ 21 Jac 1.

When the bailee is not a vendee according to the terms of one of the above Stats, or is not a bankrupt, & in all common cases of bailment, the true owner may have trover or other proper action against the purchaser, or under the bailee, or any subsequent purchaser — or against a creditor who has levied upon the goods, or any other person who has taken the goods; except sale, levy &c had been made in market overt, for the maxim, Caveat emptor here applies. 1 Will 8. Str 1187. 2 Atk 44. Salk 283.

This rule in its full extent, has been found to be upwardly inconvenient, & many Judges have thought the rule ought to be, that the possession of personal chattles as a third person, conclusive evidence of ownership, because in all purchases the possession of the vendee, & not his honesty is trusted to. But the rule is settled as first laid down; to which there is an exception when the property consists of money or bank bills; & bona fide transfer of which the market overt is good against the true owner.

This exception is founded on the nature of money. 1 Burr 452. 3 Burr 1516. 1 Atk Rep 485. Esp 39. 579. 580. Salk 126.

In substance our Stat is the same as the Stat 13 Ly 13. — Stat Com 217. 2 Rac 602.

Our Stat extends only to protect creditors. Grant however apprehends that purchasers would be protected from fraud by the common law.

Our Courts always allow the presumption of fraud when the vendor continues in possession to be rebutted by evidence. In Eng it is conclusive evidence of fraud. The creditor does not of course however lose his lien of the goods levied, nor is the purchaser in all cases to purchase again; but the vendee on presumption of false credit loses his property against purchasers & creditors.

We have in Connecticut no such stat as 27 Eliz. but our decisions are in general agreeable to the decisions of that stat against those who are, & who are becoming ~~distress~~ insolvent debtors.

When there is no fraudulent sale or conveyance, a creditor of the bailee or a purchaser under him cannot hold against the ~~bailee~~ unless the bailee is insolvent; it this rule has never been violated by our Courts, for unless the bailee is insolvent, the creditor or purchaser may have their remedy against him, therefore there would be no necessity of coming upon the bailors property, & the maxim - Ubi prior est tempore potior est jure - applies when equity is equal.

If the creditor levies upon property in the hands of the bailee, belonging to the bailor, Good Points that altho the bailee is not insolvent, that the creditor may hold the property, & the bailor come on the bailee.

Altho' the bailee is insolvent, unless he is so in possession as to give him a false credit, & unless he is in the order & disposition as well as in the possession of the property, neither can the creditor nor purchaser hold against the bailor; Never these, according to some of the Judges in Eng, tho never determined, the bailee must be in the possession, order & disposition of the goods according to the terms of the bailment, else the Creditors or purchasers will not hold against the bailor.

Yet after all, if the bailment can be so explained, as to exclude all presumption of fraud, a Creditor, or purchaser under him, will not exclude the bailors right; this presumption of fraud which is to be rebutted must be in the bailment, & not in the sale - as when the goods left were so left for a particular specified purpose, this proved will be sufficient to rebut the presumption of fraud in the bailment. Decided in the case of Brown & Anderson.

If a Cow is bailed to a poor man, neither creditors nor purchasers will hold against the bailor.

This arises from the universality of the practice in this State, for it is so common, that possession is not sufficient evidence of his being in the order & disposition of her. Yet if ten Cows were bailed to a bankrupt most probably he would be so in the order & disposition of them, that purchasers or creditors would hold them agt. the bailee.

When a horse was lent to an insolvent, to do some domestic business, the purchaser or creditor could not hold against the bailor. But if he had been lent to go to Georgia or some other long journey, most probably he would be held by purchasers or creditors, for the evidence is presumptive that it is the bailors. Neither does such lending promote the ordinary business of society.

A drover employed a third person to drive some cattle to N.Y. he drove them to Litchfield & sold them to Col. J. The owner brought trover agt. J. & recovered the Cattle. For the maxim of law is, that the law does not assist fools & Buffoons. Besides this bailment was for a particular purpose, & it is a common thing to employ persons to drive cattle.

A, instead of giving fermation to his daughter ~~in law~~, lent it to his Son in Law, who sold it; A brought trover & recovered it back; this decision Gould appehends not to be founded on principle. Gould appehends that it ought to be made a general principle, that when one of two innocent persons must suffer, the one by whose means the other was entangled, should bear the loss. 10 & 2 Ve 70. 1 Vesy 360. Doug 22. 2 Ves 175.

The courts of Law have followed the above maxim, except so far as the terms of the bailment & the explaination of the bailors possession are allowed to affect the rights of the Creditor or purchaser.

Antecedent Creditors have the same hold that subsequent ones have, upon the terms of the bailment. For false colours were held out to both, & so was it holden in the case of the cows decided in Windham County.

Quere. If goods are bailed for a certain time limited for him, can a creditor levey upon the interest the bailee has in that property so as to transfer it to himself? It would seem by the decisions that he might. 7 Ve 112.

Whatever can be taken in Execution can be sold without Execution is a rule without any exceptions; but the bailee could not have sold his right to this property, & Gould appehends the bailment ought to be considered as a personal trust, of course not liable to be taken in Execution.

Of the Actions in bailment

It is a general rule, that the bailor, on the ground of having the general property may bring trespass, trover or any other action, adapted to the nature of the case, against any person who injures or takes away the property whilst in the bailees possession. 5 Bac 164-260. 3 Rev Eng Law 392. Latch 214. 1 Roll 4.

In certain cases the bailor may have his action against the wrong doer for taking or otherwise misusing the goods, tho he had never been in possession of the property, for it is a maxim generally true, that general property in goods, draws after it possession in law. Latch 214. 2 Roll 564. Lid 438.

The more ancient decisions seem to have gone upon the ground, that the bailee ought to have the right of possession to maintain trover, or trespass. But later decisions seem to oppose that doctrine that trespass is founded in possession, & trover on property. 4 Term 489. 1 Term 480: 3 Mod. Rep 383. If B the owner of goods in A's possession, makes a parol gift of them to B, if a stranger whilst they are in A's possession takes or injures them, B cannot maintain an action against the stranger; because he has neither an actual or constructive possession. But if they are given by a bill of sale, B may maintain the action against the stranger; for in this case the goods are transferred. 2 Term 955. Rep 577: 5 Bac 164. Where an opposite case.

A manual transfer is not always necessary to constitute a ~~transfer~~ delivery. The giving of the key of a room in which goods are contained, is a symbolical delivery of the goods, & is sufficient to put the donee in possession.

A delivery to a domestic servant is as if were made to himself, also a delivery according to the directions of the donee, this parol delivery is a good one. Rep 14. Cow 294.

If a bailee delivers goods to a stranger, the bailor it is said cannot have trespass or trover against the stranger, because it was a lawful delivery. Good apprehends the rule signifies that he can never have trespass or trover in the first instance; ie merely for the taking; but after having exhibited sufficient evidence of ownership & the stranger still refuses to deliver them, he may then bring trover, on a conversion arising from his refusal to deliver them on demand. 5 Bac 164. 261: 1 Roll Ab 6. 7. 1 Bac 237.

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Most bailees may maintain an action of trespass or trover against any wrong doer, & found appurtenants all bailees may. 5 Bac 165. 262. Bull NP 33. 2 Ld Ray 276. 1 Mod 31. Salk 143. 1 Str 505.
The reason given in the books why the bailor may sue the bailee is, that the bailee is liable to the bailor. Co Lit 89. Lid 408. 13 E 69. Fitz NB 89. 92.

Gould thinks that the bailee's liability to the bailor, is not the ground on which he recovers from the wrong doer. On the ground of the above reason, it is said a depositary can maintain no action against a wrong doer, because he is liable only for gross neglect. But in the beginning of this subject it was proved, that every ~~special~~ bailee has a special property in the thing bailed. Jones 112. 1 Bac 240. 7 Ter 392. 396. 7. 8. If the bailee has a special property he may maintain an action against any one who injures that special property, taking away the property is a violation of his special property; it is a wrong & where there is a wrong, there is a remedy. Again it is settled that a finder may maintain trespass or trover against any one who takes the property out of his possession, except the true owner, and will it be contended that the finder has a stronger property in the goods than a depositary. Str 505. Lep 575.

A bankrupt may maintain trover, or any proper action against a wrong doer, who takes goods out of his possession which he holds for his assignee, & under what head of bailment is a bankrupt ranked unless that of Depositum.

Coke says it does that a servant robbed of his masters goods, may have an appeal of robbery against the robber, altho he is not liable to his master for the robbery. And has a servant a stronger interest in the goods than a depositary. 13 Co 69. Jones 129. 130. 8.

It is said by Baller expressly, that having the special property, it is sufficient to bring trespass or trover. Bull NP 33. Lep 577. 575.

In the 7 Ter 395. it is said, that a special property is sufficient to maintain trover; & said by one judge, that a lawful possession is sufficient to maintain the proper action against a wrong doer. Therefore the rule as first laid down must mean, that if he may possibly be liable to the bailor, he may maintain an action against the wrong doer.

Nor will the bailees degree of liability be enquired into on the trial. But laying aside the authorities, good policy requires that the bailee should maintain his action, for the bailor many times may be at a distance, when the wrong requires a speedy remedy. Therefore as against every wrong doer the bailee ought to be considered as the true owner.

If a bailee delivers goods to a stranger, the stranger may maintain trespass or trover against a wrong doer. This rule is implicitly, tho not in terms laid down in Roll 607.

A customer may maintain trespass or trover against a purchaser, altho he knew them to belong to another. 1 Salk 81.

A factor also may maintain trespass or trover against a wrong doer in his own name. Ward 130.

When the bailor & bailee have both a right of recovery against a wrong doer, then can but one of them recover, for there can be but one recovery for the same offence. 13 Co 69. 5 Bac 165. 2 Roll A 569. 8 Viner 22.

Reeve lays it down, that commencing the action by one, ousts the other of his ~~action~~ right of action of the same nature; because by commencing the action a right of recovery is commenced.

It is a rule analogous to the above that when a servant is robbed, the master is barred of his right which before he had equally with the servant. 3 Bac 559. Salk 127.

Also if a criminal be taken by the Sheriff, the return or taking of the prisoner does not oust his right to recover of the Sheriff. 3 Co 42.b 52.b 2 Str 873. 1 Roll 808. Co J. 557.

If the bailor has sued & recovered satisfaction, out of the wrong doer, he is barred from suing the bailee; for he can have but one ~~remedy~~ recovery. 2 Ra 1217. Co Car 24.35. 3 Lev 224. Salk 11. Yelv 28.

Yould apprehend that if the commencement of an action by one, bars the other of a right of action in Law; that the commencing of an action against the wrong doer by the bailee, discharges the bailees liability; for the rule is in analogy to where a felon prisoner has remedy against the rescuer, or escapee, he loses his fees of the Shff. Yelv 610. 612. Hut 98. ~~Co Car 109.~~ Co Car. 109.

Also when animals are damage feasant, he may take them or sue the owner for the damage, but by pursuing his remedy one way he loses the other. 12 Mod 663.4. Salk 348.

If the bailee recovers or even commences a suit against the wrong doer, he at all events is liable to the bailor, There are no authorities to this point, but it is inferable from the above rules.

The Bailee may recover any special damage he has sustained, altho' the bailor may have recovered the full value from the wrong doer. 3 Ter 65.

If the bailor takes the property before the terms of the bailment have expired, the bailee has a right to an action for the special damage he has sustained. But Gould says he would not be entitled to trespass or trover. 3 Bac 185. 266. Lip 401: 13 Co 69. who says he may recover in an action of trespass; but this cannot be law, for if his right to recover is founded on his liability to the bailor, it is clear what Gould lays down is not Law, neither can he have these actions against the bailor, if his right to recover is founded on his ~~liability to the bailor~~ responsibility of liability, for as against the bailor that responsibility is extinguished; & Coke says it is his liability which is the foundation of this action.

If his right of action is grounded on his special property, this can give him a right only against strangers, for it is on the ground that he is considered the true owner; but he cannot be considered the true owner against the true owner.

In some of the books it is said that it will mitigate the damages when the bailor is sued for taking the property; but this mitigation of damages arises from some ex post facto act, as if the property after suit, but before Judgement should be returned — but there is in this case no mitigation for the bailee has sustained as much damage since as before the suit — besides the value of the property to be recovered in trespass or trover, is real damages. It is settled that the bailee in this case cannot bring detinue, but trover is substituted for the action of Detinue, & it is most generally true that trover lies where detinue will, & to vice versa. 7 Ter 12. 13.

If the bailee delivers the goods to a stranger, contrary to the terms of bailment, ipso facto he is guilty of a conversion. Lip 581. 4 Ze 260.

It is generally true that the bailee can maintain no other but an action or the case against the bailee, & where trover or trespass will lie a promise may be brought.

Bul NP 72. 4 Com 258. Co Jac 244. 8 Ll 781. 8 Co 146.
Part. 1 Lev 191.

If however the bailee destroys the goods, the bailor may sue in an action ~~on the~~ of trespass vi et armis for by the destruction of the goods, he destroys or entirely vitiates the bailment. Co Lit 57.a 5 Co 13.b Dr 136.
2 Rolle 555. 2 Ventr 465. ~~Moor 465.~~ Moor 248. 5 Com 581.
Comb 5 Bacon ~~Abr~~. 162

Criminal matter, Wrongs
giving the Court of Justice power to set aside an
Award

If the award is of any collateral act, the action of Debt
will not lie.

If [illegible] of property be
awarded, the party recovering can [illegible] an
action of trover for their recovery if the party
refuses to deliver them.

So when the contract is about personal property
it does be right to the property, which is [illegible]
the statute of frauds & perjuries forbids that
any agreement respecting lands should be
binding unless the agreement is in writing;
which forbids the action upon the implied
contract.

In this country awards upon real
property seem to be binding, by the parties
depositing deeds with the Arbitrators; & they
upon the issue of the award with destroy the
one & surrender up the other to the recovering
party, to be recorded. But this is not the
case in Eng. for there real property must

part of at all ~~instance~~

Courts can never compel parties to submit causes to Arbitrators. But it may be done out of Court upon their making a rule of Court of it. If there is a rule of Court & the party refuses to submit, it is a contempt of the Court, & has in all contempts the party at bath & the attachments issued in such cases. This is the Dy practice for they do ~~attachments~~ issue in such cases.

What the County & Court issue Executions of Stand upon Connecticut.

Arbitrators have an inquisitorial power with respect to witnesses if there is no limitation specified. They may then call in persons who are interested & even interested persons. The parties.

If there is no agreement as to the manner in which an Award is to be rendered, it may be given in either verbally or in writing.

The law throughout upon Awards has not always been the same. Formerly when there was a verbal Award, there was no method to compel its performance. 1 D Ray 248.

It was afterwards held that if there was a consideration it could be enforced. And from this it passed to its present state, Mutual promises to submit, being now sufficient. 1 D Ray 172. 6 Mod 53. 2 D Ray 91. 96.

It has however always been held that when Money was awarded it was vested, & an action of Debt might be brought.

If bonds are entered into & broken they are only considered, & so it recovered upon the amount of the Award.

It is now in the practice to give interest being thus considered as the same [illegible]. These notes are given as security in such [illegible]

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(1) When matters of account in dispute are submitted to arbitration, but not by bond, & the Arbitrators make an award, the Plff may give the award in evidence on the Common Counts in Assumpsit, without a special count that the sum has been given in under a Judges order. 1 Esp Np 195 Kerr vs Batchelor.

Lord Chief Justice Eyre said, that as there were no Arbitration bonds, he should take the transaction respecting the difference as a statement of the accounts between the parties, & an admission of the balance due to the Plff; that it could therefore be given in evidence between the parties, & particularly as an account stated. H.

[illegible] may be proved.
But it is always best to have them in the [illegible]
2 Mod 79.

It has been pretty generally the practice to [illegible] in fine terms, confess judgements & take out execution; and to give these to the Arbitrators to distribute according to the [illegible] of the contest. This practice is in this country as general as is the practice of confessing judgements, but does not prevail in Eng. It is however an important caution, for if there is any corruption or mismanagement among the Arbitrators there is no remedy, and there has to be a decision against [illegible] When this practice prevails, the [illegible] deliver up the party [illegible]

Hands enter into partnership it is usual for them to agree to submit all disputes to Arbitrators. When this is the case the party cannot have a remedy at law until he has made attempts to have it thus adjusted. 2 Bro Ch 336.

The Arbitrators can assume power only over those estates submitted to them.

If the Arbitrators protract unnecessarily either of the parties may call them out, & if they refuse to proceed, he may revoke their authority. On this as well as all powers whose [illegible] compared with interest, if revokable.

It was anciently held that if the submission was a verbal one, either of the parties might revoke at pleasure, without being subjected to damages. 8 Co 82 Bonplow 62.1.(1)

There is no further power of revoking at pleasure with bond than without: In when there is no bonds they are liable to an action upon the case for damages.

If bonds are given? the power is revoked to what extent are the bonds forfeited? In Con they are only liable to the amount of damages; and Judge Reeves apprehends that the practice is the same in Eng.

When the submission is by rule of Court are they revocable? Says in his work upon awards says, that an attempt so to do in such cases is a contempt. — Judge Reeves conceives that upon principle it ought to make no difference. In making a rule is to expedite the execution of the award, by issuing an attachment in Eng or an fa in Ireland; and not for the purpose of preventing a revocation.

Persons who can submit Controversies to Arbitrations.

All person who can contract, and only those can submit be bound by awards.

What if an Infant should submit & some other person should be bound for him; can such a bondsman be made liable on the award? Formerly it was held that they would not. They said the contracts of infants, and consequently bonds to secure them were void. — But if an infant should purchase property & give his notes, and another man should endorse them, he would be liable. And there can be no difference in principle between that case & this. Judge Reeves conceives that he would be liable in this case. Lewis cor. v Levy. Cumberlack 318. It has since been determined that the bondsman is bound by his bond, to stand the award fairly made. Com b 318.

If an Infant submits a claim & recovers less than he could in Court, he is liable for the deficiency as for a Devastavit. 1 Dess 691 In Con they may submit. Court of Probate will in all most all instances accept the award.

What Characters are bound by the submission of Others.

When one of two partners submit, the one submitting only will be bound; it not being a power invested in them seperately by the laws of partnership. 2 Mod 228.

An Agent or Attorney who is employed to submit is not bound personally; but if he submits without authority it is otherwise.

Held so in all cases where they exceed the powers under which they act, they themselves liable.

A power to manage all causes for a person does not include the power of submitting; but a power to manage a particular cause, includes that power. 1 D Hay 246. 1 Lk 70.

If there is a contest about that part of the wifes estate, which the husband can contend as choses in action. The husband has the power of submitting it and the wife will be bound after his death. But he cannot submit nor will she be bound by his submissions of contests concerning such parts of her estate as he can have no contest over, as her lands.

Who may be Arbitrators

The law is very liberal upon this subject. All persons excepting those of nonsane memory, Minors, deaf & Dumb persons, feme Covert, Slaves, & persons attainted of Treason or felony are ~~excluded~~ permitted to arbitrate. 2 Mod 226.

But a person who is interested if the parties think proper to choose him, may sit as arbitrator. Hard 43.

Nor is any respect paid to relationship, if both parties are aware of it & a party may even sit in his own suit if the opposite party consents.

Of Umpires.

When a matter has been left to the decision of arbitrators and they cannot agree, and another person is called in to decide, this person is called an umpire.

At what time does the power of an umpire cease, after having been appointed?

It is common to name an umpire who is to decide in case the arbitrators can not agree; or else it is left with the arbitrators to choose an umpire.

When it is left with the Arbitrators to choose it has always been held that they must exercise their Judgement in so doing, & not ~~to~~ leave it to chance. For when it was decided by the casting of a coppen it was held to be a void appointment. 2 Vern 485.

There is a great deal of confusion in the books about the time when the Arbitrators power ceases & the Umpires begins? When it was stipulated that if the Arbitrators should not agree till the first of May, that the umpire should then take it and that his power should continue till the 15; & the umpire decided before the 1st of May; it was held that the umpires decision was void. For it was said that if the Arbitrators power continued until the 1st of May, the umpire could possess none till the expiration of that time; for they could not both possess this power at the same time. But if this is a sound reason the intention of the parties must be thwarted in the following case. Viz A contention was left to Arbitrators who were to decide by the 15th May; and if they did not decide in that time, then an umpire who was named was to decide in the same time. — The first decision which went to the shaking of this principle was when the Arbitrators threw up their power before the limited time, for then it was held that an umpire might legally decide: tho' at that time it was incumbent upon the umpire to prove it. But the principle has been carried still further; and it is now held that if the umpire proceeds to decide the presumption is that the Arbitrators have given up their power, and the burthen of proof to the contrary lies upon those who would shake the Umpires decision.

It has been much litigated, whether, when the Arbitrators have the power of appointing an Umpire; & they accordingly nominate one, who refuses to accept whether they can appoint another; or whether they have not executed their power in the nomination. But it is settled that they may go on appointing till one accepts. 2 Ver 100. 1 Sid 428. 3 Ray 187. 1 Ld Ray 671. Cro Jas 263. 1 Lit 71. 4 Dun 645. 2 Vent 113. 1 Ld Ray 222.

How should Arbitrators proceed to give effect to their award.

An unlimited time given them to render up the award is not void tho' inconvenient.

If an Arbitrator refuses to deliver an award up the ground that he is not limited as to time; either of the parties may revoke the power; and in this case they can revoke without any inconvenience; but in all other cases a revocation subjects them to damages.

It is the duty of an Arbitrator upon accepting the power, to give notice thereof to both the parties. The best method of doing this is either personally or by ~~letter~~ an agent. For when it is trusted to a letter it will be necessary to prove the receipt, which will be very inconvenient. And the notice of acceptance must be a reasonable time before proceeding upon it.

When they have met they must proceed to examine witnesses on oath, unless both of the parties consent to dispense with it.

The Arb as such have no power to administer an oath, if none of them ~~is~~ is an officer, ~~empowered with~~ they must procure one.

In Chancery they can compel parties to swear against themselves, ~~to~~ upon the opposite parties appealing to his conscience, and if they refuse so to do, all that the other party challenges that he can tell will be taken against him; unless it would go to subjecting him to a criminal prosecution. If there is no restriction upon the Arbitrators they may go to this extent; but if it was stipulated that they should decide according to the rules of Law & Equity they must be governed by the same rules as a Court of Justice.

As to the time of rendering Judgement, it is optional with them, provided it is within the time limited. But they must, if neither the parties nor their Attorneys are present, give notice before rendering Judgement. After having given notice they may proceed to decide whether the parties are present or not.

Can a Majority of Arbitrators ~~either sign~~, when the power is submitted to them generally, render a valid Judgement? Wherever there is a power submitted to any number of men as a power of Attorney &c they must be unanimous; excepting the

Case of Executors. This rule applies to Arbitrators. But in Con the decision of a majority is sufficient. — If however one would not come the others may legally decide provided they are unanimous, if they have notified the absent one. Burns Notes 57

~~If there is no bond & no time specified when the arbitrators must give an award, the parties must be present, the award was to be delivered, the party must be present, but if it is otherwise not necessary. This was a case. But if it is not necessary. and if there were two~~

If the parties were present when they adjourned to give the award it is a sufficient notice.

If the award is a parol one it should be delivered in the presence of witnesses. 2 Co 63

If the day is specified upon submitting the case, when the award shall be delivered; they need not give notice to the parties.

It has been made a question whether, when it was stipulated generally that the ~~parties~~ arbitrators should deliver an award, whether a verbal one was sufficient. It has been decided that it is. — And so when it was to be made & ready to be delivered at a certain time. A reservation of a judicial power to do any thing after the time limited for them to decide in, is void. As if they should deem that one of the parties should give security, and should reserve to themselves the power of determining whether it is sufficient; or if they should reserve to themselves the power of explaining all doubts which might arise; the reservations after the time limited for them to decide in would be void. Palm 100. 146: Co J 314

And so were the dispute was about cutting trees, and they found that the right was in the party complaining, and reserved the damages to be decided after the expiration of their time; this reservation was void.

The effect which a reservation would have upon the award, will often be made a question. If nothing but a ministerial act is reserved it will not vitiate the award.

Every award which is not final or does not put an end to the dispute is void. Co J 314. Hard 43.

Neither can they delegate their authority to any one: that is can leave no judicial act to be determined by another. Co Ll 436.

And for this reason when the arbitrators decreed that A should by W Gardon in such place and at such a time as B should prescribe; it was held to be a void award 1 Sk 71.

But if the power which they delegate is a mere ministerial act, it is good. As if they award such costs as C a law

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Offices should pay. 2 Atk 501. 516. 1 Atk 75:6 mod 19
Sty 787: Com R 307.

But it will be observed that if these acts depend upon the judgement of the person to whom they are submitted they are void. Sty 1075.

Of the Award.

This must not extend beyond the submission. To the persons of strangers. Christ Coll Case 1 Vol of the Bishop. ~~But when the Award is [illegible] the Submission of~~ submitted. Must be both physically & morally possible. Must it be reason. Must it be certain. Must it be final. Must it be adopted by both parties.

It is made a question whether when a specific thing is submitted, money can be awarded at all as a compensation. As when the award is about a horse, & they decide that one of the parties owns the horse and the other has a lien upon him; Can they decree that A shall give B a compensation in money for his lien? In such a case Judge Ke says they can not.

It is also made a question whether a collateral thing can be awarded as a compensation for a right? Much controversy exists with regard to this question; Many of the elementary writers suppose that it cannot but there appears to be no ~~good~~ case to warrant the supposition. On the other hand there are decisions which tho' not exactly in point seem to favour the idea that it can. When the Arbitrators ~~decreed~~ awarded that 1 X. dinner of jewels should be ~~awarded~~ given, ~~it was~~ in satisfaction of an injury, the Court determined that it was a legal award. And it was likewise held to be a legal award when ~~[illegible]~~ a bond, which was not submitted, was awarded to be given in compensation for a claim. 6 Mod 221. 2 Ld Ra 1093 & 1039. An Act to be done securing to the ~~the~~ person in whose favour the award is given his right & may be legally awarded ~~done~~; as that A pay B £10 or give him a bond &c. Courts of Law cannot order collateral acts.

When matters in dispute are submitted ~~before~~ partners, the arbitrators have, unless restricted, in all cases the power of dissolving the partnership. 1 Atk 471. So when specific work has been set # If they cannot [illegible] it is not.

A parson of a parish had a contest with his parishioners, about the payment of tythes. The parishioners contended that there had been a commutation for them; in which it was agreed that money should be paid in consideration of them. They found the commutation to be good, and awarded £7 to be due to the parson, & a certain sum yearly from that time. It was contended that they exceeded the submission. But the Court held that the award was good; upon the principle

That they may proceed to settle all disputes arising between the parties upon that head.

No new controversy arising since the submission is within their power to decide upon.

An award that one of the parties should pay the costs is however good, unless they are restrained. 2 Dun 645.

An award ~~must~~ not to be legal, extend to a stranger, unless it would be beneficial to the parties. Therefore an Award that A should convey to B & his wife is void, the wife being a stranger to the award. But if it was that the party should discharge a debt due to a stranger by one of the parties it is good, for this is to his benefit. 5 Co 77. 1 Dk Ra 123. Bk 74.

An award that a thing be done by a stranger is void: for it is out of the power of the party to compel other men to act. As that A one of the parties & his son a stranger should give bonds. 1 Vill 28. 58.

~~Of awarding~~ ~~to~~ Releases

It was formerly held that an award of mutual releases to the time of the award is void: Because between the submission, & the award, new disputes might have arisen; therefore the award might be more extensive than the submission. But now the law will presume no new dispute to have arisen, between the time of the submission & the award. Therefore such award is valid, till such new disputes be proved to have arisen, & then to the time of the ~~case~~ submission. And to that time the releases must be counted. 10 Mod 201. 6 H 37. 2 Dk Ra 639.

~~Of awarding a parcel~~

The award ought not to be made of a parcel of the ~~goods~~ submission, no more than to exceed the submission. But in this case no more than in the other, the award is not always void.

The words of the submission may appear to be more extensive than the award; but yet if the award was of all that was submitted in fact, it is good. As when the submission was about all the contests real and personal which ~~had~~ existed between the parties named & the award was only about personal contests, no other having in fact been submitted to them; in this case the award was decided to be legal. And the presumption is in all other cases in favour of them having been no other matters, in fact submitted. 8 Co 98. Cr El. 815.

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There are two methods of submitting, General and Special. A General submission is of all contentions whatsoever. A Special submission is where the disputes submitted are named: a submission in these terms would be called a Special one; "Of all "Contests; viz, of all trespasses, and batteries. –

When there is an award clause (which is or the general one) (or upon the premises) decide in a given time, the rule is the same even then, as to their having fulfilled their duty, if they ~~in fact~~ decide upon all matters which were laid before them (if they pay). Hob 29. Co Jac 200. Hob 355. Hob 575. Co Ch 216. 1 Wms 274.

But if the submission is a special one (with an award) and they are not all decided upon, the award is void. 8 Co 98

What if there is a special submission without an award clause; as a contention about a trespass & battery being submitted, if they decide only upon one is it good? It has been so decided. 2 Vern 100. Ld Ray 316: 8 Co 98 – In the contrary see Bernidiston. But if this is a sound rule, a decision upon one does not effect the others, and an action may be supported on their account, upon the same ground as if there had been no submission.

And if there is a submission of all the claims which A & B have against C, and they decide only as to A's claim, this award is good. 1 Vern 259. Com 547.

~~No Award of a thing which is unlawful is~~ good.

There are many acts which are injurious in the opinion of mankind and which cannot be redressed upon a legal process. It was anciently held that an award for an injury of this kind was void; they said that the law did not consider them as injuries they were not so. Charging a man with being a liar is not a wrong which will support an action, unless some special injury has accrued thereby; they accordingly held that it was out of the Jurisdiction of Arbitrators. But the Law is otherwise at present.

These words are not actionable upon the principle that no words are actionable, unless they charge a man with an indictable offence, 1 Sid 12. 2 Ventr 243. 1 Hard 12. or with one which will subject him to a fine. Vis injurious in its nature.

The award must not only be lawful, but possible to be performed. That is physically, or in the nature of things; not impossible as relates to the party. An award that a man should move a mountain would be physically impossible; but an award that a man should pay 20 £ would not be void, not being physically impossible, altho it might be so as to him.

An award that a man should procure another to give a bond is void, for the party having no control over another man, it is impossible as relates to him to do it; altho' there is a possibility of his being able to prevail upon the man to make one. But if there is an alternative or pick is possible: as that A shall procure a bond, or pay 20 £, then the award is not void.

If however an act is ordered to be done by a third person who is in the power of the party, then it is not void. As an order that A shall take up a certain bond; he after having paid the money by filing a bill in Chancery, he may be compelled to deliver it up.

An award must be reasonable, or rather it must not be unreasonable.

Upon this principle an award that A should serve B a year was decided to be void, upon the ground of its unreasonableness; and not upon the ground of it being a collateral act. And upon the same principle an award that a man should marry a woman was decided to be void. And anciently it was held that an award to pay a man money at his own house was void, because he could not fulfil it without committing a trespass. But the modern idea is different.

An award upon a submission of what the damages should be, were a man had taken another goods, that he should barely return them was decided to be void upon the same principle. And so are all awards which are trifling or vexatory as that a man should comb his hair, or wash his hands. For the award should be advantageous to both parties.

It is not necessary that the award should be mentioned for what it is in consideration of, if it can be gathered from it; tho there are many authorities

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to the contrary.

The award must be certain or so connected with other things as to be capable of being so reduced. If it is altogether uncertain it is entirely void. 2 Saund 297. 5 Co 77. 6 Ch 432.

A & B had a contest about a wharf, of which B had the possession, & had piled up boards so as to obstruct A's light. The right to the wharf & the complaint of the nuisance was submitted to arb. They found the right to the wharf to be in B, and in favour of A as to the boards being a nuisance; and awarded that they should be pulled down. It was contended this this was a void award, for they did not direct who should pull them down, & was consequently uncertain. But the Court held otherwise. They said that the law would imply that the creator of a nuisance, should be compelled to destroy it. 2 Ld Ra 1076. 6 Ch 383. 2 Ra

An award of costs of suit is held not to be uncertain.

It is no objection to an award upon the ground of uncertainty that the Act fix a penalty in case it is not complied with.

So the not fixing of a time is not a sufficient objection for the law implies a reasonable time. Nor is the place; for it is then impliedly left to be paid upon demand.

The uncertainty which appears on the face of an award may in some cases if the proper averments are made in the declaration be remedied. 6 Ch 384.

As where it was submitted to arbitrators to decide whether the enclosure which laid between Batten Down & Bastion down, belonged to A or B. and they found that the enclosure which lay between A's meadow & B's meadow belonged to B. Yet by averring that these meadows were the same pieces of land specified under different names in the submission, you may help out the award. 1 Ld Ra 612.

So where the award was that A should pay B a sum for his wheat as C bought wheat for a sunday. This may be helped out by ascertaining that price, & averring it in the declaration.

But if there is no standard to get at it is void. As an award to pay as much as in conscience is due. And so where A was to pay B for task work & day work no sums being specified, it was void upon uncertainty.

For there is nothing to be got at by the averring of which the award can be rendered certain. 2 Saund 262.

It was formerly held that if the award did not specify for what the awards was made, it was void. As when the submission was for a trespass, & the arbitrators awarded £ without specifying for what, it was held void. Now it is otherwise now; for the law presumes that it was for the thing submitted. 1 Ld Ra 240. Ho 49.

An Award must be final. That is it must put an end to the original cause of action. As if the original cause of action is a trespass & this is submitted, and after the award a cause of action is left open upon this same trespass, the Award is not final & is consequently void. — This does not mean that the award must be such as that no dispute can arise out of it. If the submission is of a debt and they award it to be, & B refuses to deliver it; here altho' A to recover it must bring an action of trover, yet it does not avoid the award. 6 Mod 39. 2 Ld Ray 961. Hob 64.

So an award that Osbond shall not be sued is held good; altho' it was contended that it was not final because the duty to pay it still existed. — Also an award that all suits should cease is good, tho it has been contended against upon the same principle. Sty 403.

For the following rule there is no reason, that it should exist at present tho' it might have been otherwise formerly. For if the rules that have been before laid down are complied with, this is virtually fulfilled. — The rule is that all awards must be mutual. If the submission is for a trespass & damages are awarded, tho' not supposed to be for this, this a mutual award; for one of the parties is released from an action for that injury, the law implying that it was for the trespass; & the other obtains damages in satisfaction thereof. Cro. 378

The principle which they formerly proceeded upon in deciding upon awards was to destroy them if they could; and the modern idea is to support them if possible. 1 Ld Ra 612.

Of those Awards when part being void renders the whole void; & when a part being void does not render the whole void.

If the Art should award that a man should do two things one of which was void; yet if the party in whose favour the award was thinks proper to dispense with the void part & rest satisfied with the legal, the law will hold it good.

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For instance — If there should be an award that A should give a Bond for 10 £ & A & his son for ten pounds. This be an award that a stranger shall do a certain act is so far v but if the party chuses to accept the award dispensing the void part he may; & A cannot object. Cro Ell 432. 2 Lev 6.

When the mutuality which was intended by the Arbitrator cannot be got at by reason of part of the awards being void; the award is void. — To take an instance when Arb could not award Costs. The Arb awarded that A should pay B £10 and that B should pay the costs of certain suits. Then the award of costs being in consideration of the award of £100. and that being void destroys the mutuality. Cro J 577. —

Also if it should be awarded that A should pay B £100. and that B & his son should convey. This is void for the same reason. 2 Saund 293.

If the Arb should specify as to their award in case particular article, & then should go out of their award specifying their award for that article also, it would still be a good award. As if they should award were a complaint of trespass, mower & battery was submitted; that A should pay B ten pounds for the battery & 20 £ for the trespass and that B should pay A 20 pounds for the mower; & then should go out of the ~~trespass~~ award & say, that as to the case of the Horse B shall pay A 40 £. Then the award is good as to all within the submission & only void as to what is without. — But if there had not been a specific as to each, but a general one including that case without the award it is void. For then it would not be possible to decide how the award was as to what was in the submission; it not being legal to call upon the Arbitrators to decide or to testify.

If an Award is good as to A, & void as to B, & B will come forward & do his part, A cannot object.

And there are cases where the award is held void on one side, & that party refuses to fulfil. There are the cases where a man gets all the compensation which the Arbitrators intended without his doing it. As where a trespass is submitted & the party ~~upon~~ complained of is awarded to pay 20 £ & the other party to execute a discharge then it is a good award altho he refuses so to do, for the Law in such cases implies a discharge. —

It was formerly held upon this head that all awards were void in toto which were partially so. Then the rule was adopted, that they were in all cases good only as to the void part. — And after this followed the foregoing rules which are now fully decided to be Law.

Performance

Of the form of the award

As has been before observed, it is optional with the Arb to deliver their award verbally or in writing unless the contrary has been stipulated. 1 Lid 158.

Positive & negatory conditions are void. But if there is a semblance of reason in them they will be held good in law; as that the award shall be delivered in the presence of two witnesses. Palm 109. 121. Barnes 56.

When the award was laid with an Ita quod - of & upon the premises; or that you only make an award of what is submitted, more na less; the presumption is that the Arb have not exceeded it.

If an award is substantially performed tho not literally on account of impossibility, it is sufficient. As when the Arb awarded that one of the parties should deliver up another a will, & he had previously given it up to probate; yet this is a substantial performance of the condition: for letters testementary can be procured which will answer the purpose fully. 6 Mod 84.

So where a stranger of a suit is ordered & a discontinuance is suffered, it is a substantial fulfillment of the award.

When the thing awarded to be done can be done without the concurrence of the other party, this must be done without request. But if the other party must concur & you offer to do it & he refuses, you are not liable upon a breach of the award if you stand ready to do. 1 Ld Ra 233.

If the arb award things to be done by both the parties; can one of them sue the other upon the award, until he has fulfilled his duty? If the thing to be done by such party appears to be by the award, a condition precedent to the act of the other, it is necessary for him to fulfil it, before he can support his action. If not so they may either a both sue, before performing their duties. 3 Bay 169

If a party requests that another should perform an award different from what the Arb directed, a compliance with such request is a fulfilment of the award.

Time of performance

The time is usually fixed by the award itself. But if no time is there named; it must be performed within a reasonable time. What a reasonable time is, is a matter of fact, which must be determined by the Jury.

If money is awarded, a reasonable time is directly.

It has been mooted a question, whether, when an unreasonable time has elapsed for the performance, ~~and a suit has been~~ the party can refuse to accept a tender? It is now held that a tender is a good bar to a recovery.

Of breaches of the Award.

If the Arb award that all suits between the parties shou cease, & one of the parties had a suit in connection with another man against the parties opposed to him in the Award, it does not include this suit. If A the Plf was a member of a copartnership & was joined with other in that capacity, it clearly would not affect it. This capa is new similar being joined with B as a partner. 1 Mod 204. 302. Yelv 35.

An Award that a man shall give a note is no broken, if the man does not pay it when it becomes due Sty 603. 2 H 1002.

Of the Remedy

You may when money is awarded have an action of debt or assumpsit. If of a collateral thing assumpsit lies.

If either of these is brought the declaration is founded upon the implied promise, inferred from Submission. The declaration must state the Submission, that is every thing which is substantially contained in it; also the controversy that is the general outlines of it; & the ~~ba~~ substantial parts of the award also a request is necessary. 2 Sty 923. 2 Lawrd 33. After this you must proceed & state a non performan & what it was. — These things are all which it is necessary to state in the declaration; & if it contains the the not strictly formal, yet it will be unexceptionable.

The most usual method pursued upon submissi is by entering into bonds; or by giving notes with condit and delivering them as escrows.

The following observations are equally applicab to both of these cases.

When there are bonds entered into to stand the ign of the award an action may either be commenced upo the bonds, or the award. The bonds being given only as a collateral security for the award, & not to take awa that remedy. But the usual method is to bring it upon the award. Sty 923.

The method of proceeding in suing upon these bonds, is, for the Plff to declare upon the penalty of the bond. Upon this the Deft prays oyer of the ~~bond~~ condition of the bond. The Plff thereupon sets it forth

and thereupon the Deft replies that there was no award; the Plft then answers by setting forth the award & assigning the breach. If this statement is true then the Deft proceeds no further if he does not admit the Plfts claim to deny it. But if he does not admit the Plfts reply he rejoins that there was no award, ~~& that it was void~~. If the ~~award~~ award appears to be void upon the face of the rejoinder then he may demur to it. A plea ~~is bad~~ in the rejoinder ~~that~~ there was no award, means that there was none in fact; but in the ~~reply~~ plea it means either that there was none, or no legal one. 1 Saund 617

The Plft in his replication must in stating the award, ~~state~~ that it was delivered on the time stated if one was fixed upon; and that it was in writing if so required & indeed any conditions being fulfilled that the law recognizes as legal. Cro Jac 270. 2d Mod 77. Hardress 399. 1 Show 98. Id 242. Carth 158.

It was formerly held that it was necessary not only to state ~~that~~ the award was in ~~strict~~ conformity to the condition of the bond, but that the Plft had performed his part. But this rule now prevails but in two cases. 1st When the thing awarded against him is void; for otherwise the party opposed to him, may object to the award for the want of mutuality. 2d When performance on his part is a condition precedent to the Deft being required to do his part. This rule must not be construed so strictly as to mean ~~that~~ the party must absolutely have performed his part, before he can support his action against the other; it is sufficient if he has offered ~~to~~ to do. Hardress 43. 44.

The Plft in stating the award may either state it verbatim, or he may count upon it, stating it as he conceives it to be. If he does not state it verbatim, he should make a profert of it in court; if the Deft supposes that the award was not counted upon rightly, he may pray oyer of the award, and set it out verbatim, and demur for the supposed variance. If the Plft sets out the award without a profert the Deft may answer no award, & if it in evidence appears different, he will have judgement. 1 St D Ra 715. 1 Ven 217.

Upon delivering in the award the Deft may plead that he did not submit. But upon the

bond he can give no such plea. ~~He may~~ Upon praying over the condition will be set out, and he cannot to plead for it will appear by the condition that he did. If he wishes to have the effect of such a plea; he may plead non est factum.

If the submission is to have it determined by an umpire in case the arbitrators cannot agree; the Deft must aver that neither the arbitrators, nor umpire made an award; because the defence in all pleading, must be as broad as the Charge.

If a breach of the award is assigned by the Pltff, the Deft may demur, but if he does not demur, the cause go to the Jury, who bring in a verdict against him, yet no Judgement can be rendered against him, but the Court will be required to find for the Deft. Yelv 153.

If part of the award is void, there will be no necessity to assign a breach as to the void part. 2 Ld Raym 1149. 1 Wms

If an award is made in the alternative, the Deft must aver, that neither of the conditions are performed, unless one of the conditions was void.

It has been an old established rule, that when an arbitration bond was given & forfeited, if a number of things were awarded to be done the Pltff must assign but one breach. But if the action was brought on the covenant or promise, all the breaches must be assigned. The reason given was, that one breach was sufficient to forfeit the whole bond. This was conclusive to show that the assignment of one breach was sufficient, but not any reason to prove why the assigning of more than one breach was bad. — Judge Hemphill apprehends that it would not be bad pleading to assign a number of breaches. He thinks that his opinion is warranted by a number of authorities. Phill 262.

If the Pltff sues upon the bond, & the Deft prays oyer of the condition; he may state the award & plead some collateral thing; as that he has done what the award directed. When the Deft pleads this, the ~~Pltff~~ must go on & state an award & a breach; for this is to be his plea only when the Deft pleads no award. In this case the Pltff must ~~reply~~ demur, if the performance appears to be an illegal one, or that it is an insufficient one. But if he would still insist that there was no performance at all, he must traverse the plea.

In a case when the Deft pleads no award & Pltff goes on, & states an award & a breach. Then if the Deft means no legal award he must demur to it, if none at all he must traverse it. So he must either deny or traverse.

Why cannot the Deft state in his rejoinder that he has performed? — Because it is illegal in the rejoinder ~~it is illegal~~ to depart from the plea. His plea in this case was, that there was no award.

When the action is on the bond; & the Deft prays oyer of the condition; and wants to avail himself of the circumstance of the awards being of but a parcel of the things that were actually submitted; What must be his plea? Instead of pleading that there was no award, he must plead that there was no award in the premises. The Pltff sets out the award & assigns a breach. But by the award it appears that there was not an award of all the matters mentioned in the submission. The Deft cannot take advantage of this by demurrer. For if two more things were submitted than were awarded upon, it is still good. And if a demurrer leaves any case which by hypothesis can supply ~~a plea~~ that the Pltff replication is good, it is a ~~good~~ bad demurrer. — The Deft must rejoin that there were other things submitted than those in the Pltff replication, & that the Arbitrators refused to award upon them, or omitted to do it. — Upon this ~~the~~ rejoinder the Pltff can do nothing but deny the fact in his rebutter. Co. J. 200. Pat. 511.

These are the usual methods of proceeding; but not the only ones.

If the Deft conceives the award to be bad, he is not obliged to plead no award. He may pray oyer ~~of the~~ & then set out the condition of submission, & then go on & state an award & what it is; and aver that there was no other made. The Pltff then replies either by demurrer or traverse, as the case may be. Co. Ll 838.

If the Deft means to ~~deny~~ rely upon performance of the award. He may then proceed as above & allege performance. — When part is void the Deft may aver the good part only has been performed. Vendue's refusal is a sufficient averment.

If a thing is to be done first by the Pltff it is sufficient to aver that he has not done it.

If the Deft after praying oyer, pleads that there was no award and the Pltff replies that there was a revocation by the Deft this if true is sufficient to sustain the action. For the bond is forfeited upon a revocation. 8 Co 81

There has a maxim gone abroad which seems not to be depended upon principle; and has lately met with a decision. When bonds were given to stand the award by a time limited; and thro' accidents the arbitrators are not able to make the award within the time; and the parties consent to prorogue it, without renewing the bonds. 8 Co 592.

Of the Powers of Chancery over awards.

When the awards are of money there is no need of the interference of a Court of Chancery.

When there is an award to do a collateral act, & the party refuses to comply, an action can be supported at law to compel an indemnity in damages on the bond. But can Courts of Chancery in these cases compel a specific performance? —

In all cases where there has been a reference by rule of Court to submit, they will order a specific performance. When there has been no rule of Court, only occasionally according to the circumstances of the case.

If there has been an agreement between the parties to perform it specifically; Chancery will interfere to compel them. 3 P W 187. 2 Vern 24. 1 Atk 74.

If an award is not perfectly good; Chancery will decree against either of the parties discontinuing to abide by it, provided they have acted under it for some time. The Courts of Law can afford no relief.

Re by they never at law under an award void for any thing extrinsic. ~~of the award~~ Cause. That is, if the arbitrators have acted even so ~~improperly~~ improperly and the award has all the requisites of a good award upon the face of it, Courts of law can afford no relief. But Chancery will. 2 Vesy 315. 2 Atk 149. 3 Atk 529.

But in Eq they may at Law plead corruption in the arbitrators or other extrinsic matter.

The following cases will exemplify the nature of this corruption or misconduct.

If there is a partiality among the Arbitrators; it will render the award void in Chancery.

Where one of the Arbitrators was excluded by the others; it was held in Ch to be such a piece of misconduct as entitled the petitioner to relief. 2 Vern 315.

So also when the Art in secret heard the story of one of the parties. —

Turning up a piece of money to decide the dispute is also such ~~a piece of~~ misconduct as is contemplated. 2 Vern 425. And so is refusing to hear all the witnesses after promising so to do. 2 Vern ~~100~~ 101. 2 Vern 251. 3 PW 362. 2 Ves Jr. 218.

218. ~~It is not that the parties~~

Chancery will also relieve ~~it~~ when there has been a misconduct on the part of the parties. As if ~~the parties~~ either of the parties should suppress the truth, and the Arbitrators would come into Court & swear, that had the facts that were suppressed, appeared before them their ~~award~~ award would have been different. 1 Atk 77.

Judge Reeves knows not of any such instances occurring in this State, and consequently cannot say whether, ~~they~~ Courts of Law would relieve or not.

An award that a person shall do a collateral act, is usually set aside in Chancery on the ground of its being inequitable & unreasonable. As an award that a guardian shall give his ward to convey land.

When a petition is presented to set aside an award, it is a common thing to join the arbitrators, when the petition is founded upon the ground of improper conduct in the Arbitrators. This is for the purpose of obtaining costs. For if there did not appear any misconduct on the part of the party petitioned against, Ch would not grant costs against him. 2 Atk 396.

If the award was made by rule of Court, and the award was procured by corruption, or by improper conduct in the Arbitrators; then it may be remonstrated against in a Court of Law, who will grant relief.

When the reference was made by rule of Court, ~~it does~~ ~~do not return~~ in Eng it is not necessary that the award be returned into the Court. But in Con it is necessary; and that it shall be returned to the Court on the term following the rule. When is any ground for setting it aside application must be made within that time. But if the time has elapsed, & the discovery of corruption was made, there is no relief but by application to Chancery. — 2 Atk 155.

Will Chancery relieve when arbitrators have not decided according to Law, or have mistaken the evidence? Neither Chancery nor Law will interfere if the award appears upon the face of it to be legal.

When it appears from the face of the award, that the Arb upon declaring the principle they proceeded upon mistook, then they will relieve.

An Award is generally held to be a bar to an action, tho' formerly otherwise.

An Award is not only a bar as between the parties, but often as between one of the parties & a stranger. As in case where a full satisfaction has been obtained. For it is a principle of Law that on full satisfaction, is a bar to an action upon the same ground. — But when it is only a partial satisfaction, you

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may go on & recover the whole again; for the partial satisfaction will not be considered. Com. R. 328.

If a man sues after submission & before award; will the fact of submission operate as a bar to the action? It will be a temporary bar for that time; but if the award should not be made, or should be illegal, it would not be a bar to a future action upon the same ground.

It was formerly held that he might; & for remedy the party sued must have recourse to an action for violating his agreement of submission.

It was also once held that if the time had elapsed in which a party was to perform the award; that the other party might sue upon the original ground of action; as well as upon the award. For said they, the award to be a bar to another action, ~~upon the principle that a new~~ must be performed. But it is otherwise now; and upon the principle that a new remedy bars an old one.

If the Deft pleads an award, & it appears to be void, he will have the Judgement go against him. And he has no remedy but by petitioning the Court for a new trial upon the ground of his having mistaken ~~the~~ his plea.

Of Foreign Attachments

These rules are founded upon ~~the Stat of this~~ a State in the State of Connect.

When a Creditor cannot procure his debt by reason of the debtor having ~~quit the state~~, then provided he has left debtors behind him, his creditors have a remedy left them by a writ of foreign attachment. Or by pursuing up their claims against the party absconding, and by virtue of that Judgement, to obtain ~~the debt~~, after pursuing in a specified manner, the debt from the absconding debtor.

If the property which the Debtor had left behind him was of a visible nature, or such as could be got at, then a remedy would be left by an attachment; & one remedy being allowed already, ~~this~~ for those cases, this writ is not intended to embrace them. But in States where the system of Attaching does not prevail, it is customary to pursue this remedy. This Attachment extends to debts, as well as to other property, of such a nature as cannot be got at.

It is necessary, in the Commencement of this action, to leave the process with the Debtor, against whom it is intended to recover. When this has been done the Debtor is barred from paying over the property to the Creditor; and he may plead this in bar to a suit from his Creditor, after he has paid over the money upon Judgements being obtained.

It will be necessary to observe that to the motivation of

This action it is necessary that the party should be out of the State. And Judge Reeves has understood, that the State of Ct. has it in contemplation to make the same regulation. When this action is brought, it must be against the Absconding Debtor. The Plff commences it by leaving his writ ~~with the~~ with the Debtors, agent, attorney, factor, ~~leaving the~~ leaving the Debtor with the process. This by the practice is continued for a reasonable time for the Deft to have notice. It has, & very improperly, been the practice to serve any person with process; but the writs by a late construction, are all avoided.

At present those cases only will be considered where they are in fact agents &c.

This process operates merely as an Attachment. ~~When the Judgment is obtained it issues, & the creditor~~ When Judgement is obtained, Execution issues. The Plff Then with meet & make a demand, & within the sixty days which is allowed in Con for Sa to run; if he does not go within that time, his lien is gone, & they are either liable to another writ of foreign Attachment, or the Debtor may pay it over.

If the Debtor pays money upon this process it is a good plea in bar, to an Action from his Creditor.

If the Debtor remits the amount of the Debt or any part of it to his creditor, it does not destroy his liability.

This Action does not extend to cases where an pursued to gain compensation for wrongs.

If the Debtor does not pay it upon demand; he has changed his creditor; and he is ~~consider~~ liable to have an Action brought against him for the Money by the Plff. This Debtor is called the garnishee. — A Scire facias upon his refusal issues, to show reason, if any he has, why he shall not pay it out of his own proper goods & Chattles. — If upon this he refuses to appear & show Cause, process goes against him of course.

If the debts between the garnishee & the Debtor is a doubtful one, he can dispute it in this process of writ as under any other.

The garnishee in this case is allowed to be a witness. If it appears that he has no property of the Debtors; or that he has orders to dispose of it to the satisfaction of other demands before the commencement of this suit, it is a good defence, & costs will be allowed him.

If his defence should not be a good one, & Judgement goes against him, costs will not be allowed him, in settling with his creditor; for it was his own folly to defend against an indefensable Scire facias.

It has been made a question whether the garnishee can swear, upon being amerced on the Scire facias, without being required by the Plff? It was once held that he could not; for that he stood upon the same ground as chancery parties do. But it is now settled otherwise; he being a

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witness created by the Stat; the Stat being intended for the garnishees benefit.

If an Execution has been taken out by the Creditor, previous to the commencement of this suit, & the officer comes to attach, can the garnishee safely pay the Debt? It has been decided that he may. The Court in this business goes upon the ground of not putting the Debtor upon any worse situation that he was before the Action; and if he was compelled to have recourse to petition for an Audita Querela it would inconvenience him.

From this has originated the idea that an execution debt is not liable to this action. But this is erroneous. It is only true that when an Execution Debt is paid, it is not liable to this suit.

Does this suit furnish a ground for proceeding against the Debtor with an Execution? The Courts have decided that it was nothing more than an Action against the garnishee.

It will often happen that where a person is factorised, the debt which he owes is not yet due. In this case the process furnishes the Plff with a ground to recover when it is due.

If the Debt is to be paid in some collateral ~~action~~ thing, he must deliver them up, that the officer may dispose of them ~~for them~~ at Auction, & apply the proceeds. —

Of releases

Another defence of this action of Assumpsit, & indeed of all actions, is a release. This is when a right of action has accrued, & the person entitled to it has liberated the person liable from the claims. These releases are some of them made to extend only to one particular thing, others to many, & there is one kind which extends to all.

When the release is of all demands it extends to be a bar to any action that can be conceived of, excepting some exceptions which will be hereafter noticed.

A release is a bar, without having discharged the demand it is unnecessary to prove any such thing.

~~It is however~~ said that a release should have a consideration, ~~as much as any other sort~~ bargain, to render it obligatory. ~~But the release itself imports a consideration~~ In Eng When it is necessary to seal them, that solemnity imports it is a release, as much as is a bond. And signing in this County has the same effect. — So whether there was one, is a fact that can never be got at.

It is usual to express a consideration; but it cannot be shown that there was none.

But if there is no consideration expressed, & the signing is not of the same validity here as sealing is in Eng, then they must

prove a consideration.

Altho' the release was signed & sealed, & a consideration was actually paid, yet if the consideration appears on the face of the deed to be nugatory in fact, the release is a void. The presumption which the sealing carries of a consideration, appears not to mean any thing when a consideration appears upon the face of the instrument. This is Judge Reeves opinion. It appears reasonable: from the consideration that when a nugatory consideration appears upon the face of a Covenant, altho' sealed, yet merely nominal damages can be recovered at Law: and Chancery will not regard them.

The word "demands" in a release extends to all things which are demandable at that time; but as to those which are due at a future period, some are discharged & others are not. Co Lit 291. If the release is of all demands it extends to all notes or bonds, tho' not due. Co J. 300.

In all cases when any thing is due for rent in gross, these are discharged. As if it should rent to B a farm for ten years for 100 £, this is a gross rent & would be discharged. But if it is a rent which goes with the reversion, then it is not discharged in future. This is called a rent in reversion because it goes with the land, if that is disposed of. Viz. if B was a farm, which he rents for ten years, at £10. per year, now a discharge of all demands will discharge all that which has accumulated; but does not extend to rent not due; — If the owner should dispose of this farm, the purchaser would be entitled to the rent. Co Ll 606. Co J. 487. Co Ll 666. 1 Slk 578.

So when the liability depends upon some contingency (not the contingency of not proposing) the claim does not pass by a release of all demands. Co J. 170. 171.

Altho' this word "Demands" is of such general import, yet it has sometimes been limited from its legal import, by reason of the particular occasion which gave rise to the discharge. Viz. D made a will, giving A (a creditor to whom he stood indebted 1000 £) 5 £, and died, A also died, their Exs were L & J; L & J's to pay the £5, & J gave him a discharge from all demands. It was in this case restrained to the £5, it appearing manifest from the face of the particular occasion which gave rise to it, that J intended nothing further. Parole proof could not be introduced to prove that it was intended only to extend to the five pounds; and it can only be gathered from the occasion & the instrument.

So wherever you can from the instrument itself, collect, that it was not intended to go further, it will be so restrained. 3 Mod 277. Carth 119. 2 Lev 215. Sho 150. 152 or 153. or 155.

If you cannot gather the fact from the instrument itself, can not you prove such a set of facts, as will raise an unquestionable inference that such was the intention

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of the party releasing? The law upon the subject of ~~not~~ suffering parol proof to contradict a written instrument, seems not to extend so far as to prevent your proving facts from which may be inferred, something varient from what appears on the face of the instrument. — But the Judge knows of no Authorities in support of this Idea. It has been made a question how far a release of all covenants extends.

Co Lit 292.

There are two other words in the books that are said to be as extensive as all demands. Vi All claims. And all Sudations. Co Lit 290.

All ~~actions~~ Claims seems to extend to a future right as well as demands. He knows of no cases in which it varies from Demands, excepting Progressive & Annuities not yet due. 5 Ll v 97.

A release, as well as a contract, if considering an illegal, or fraudulent act, is void.

The Doctrine of infancy & Duress, which equally applies to this, as it concerns has already been taken notice of.

Of Debt.

In all simple Contract Debts, the action of Debt is not brought, but Assumpsit. This was substituted to prevent the wagering of law in the action of Debt. The Stat of West gave the Action of ~~Debt~~ Assumpsit as a substitute for Debt in this case, as well as for many others.

Debt in many cases is the proper, & in some the only remedy; as in the case of penalties.

The original Idea of the action of Debt was, that it should be brought in all cases where the sum was definite. But it could not be brought in Actions for damages, for here the sum due is uncertain till the Court have determined.

If there is a penalty enacted for certain offences, this action may be brought by a Stranger. If part of it goes to the Public Treasury, then he must join the name of the State. If the ~~penalty~~ Stat does not enact that any person may sue for a penalty; then it is confined to the person injured. Vi. When a penalty was fixed upon those who neglected to set off Fy Flies. Then the right to sue vests in the Farmer.

If the Stat fines a fine, then in all cases, it goes to the Public Treasury; If a penalty to Individuals, this is merely a civil action.

If an action is a civil one, it may be appealed; if a criminal one it may not. A penalty therefore may be appealed, but a fine may not. 1 Roll 598.

This action is sometimes an action upon the Stat at large and is not distinguished by the name of an Action of Debt.

The proper plea on an action of Debit, is, nihil Debit. When actions are founded upon Jud.t then Debt is the proper action: and in many cases it is the only action.

The action of Debt on Judgement, does not punish any fraud pertaining into the principles on which the Jud.t was obtained. For this would be to question the propriety of the proceedings of the Court. — The general plea on this action of Debt on Judgement is nihil Debet. — But if the Judgement was obtained by a Rich, or fraud, it may be shown. This goes upon the ground that no Judgement was made; & it does not at all affect the Constitution, which says that full credit shall be given to the Jud.ts of the Courts of other States.

Altho' Jud.ts are of force out of the State in which it was obtained; yet Execution carries no authority beyond such limits.

With regard to the Judgements of foreign States; excepting those cases which are regulated by the law Merchant, which carry most the same weight in different countries, as others do in the different States; the Judgements of Courts carry no other force, then to raise a presumption, that the debt was due. But it may be attacked, & it can be shown that there was no original ground of action. Doug. — the first case.

If there any defect mistake the Judgement cannot be proceeded upon, then a Scire facias may be brought to review this Judgement: or an action of Debt upon this Judgement. Viz. If A by force of an Execution takes C's land think it is, it is B's; then the Clerk cannot grant another Execution, by his own authority; & to procure one, one of the above methods must be pursued. — So also when you have had land appraised off & satisfaction of an Sa fa so many years, which land was an estate depending upon the life of another, & that other person dies before the time expires; then another Execution may be obtained by dint of a Scire facias. — And also in the case when a man swears out of Jail, after having been confined by force of the Sa; another may, upon his acquiring property be obtained by a Scire facias.

Where there is a covenant to pay a certain sum, an action of Debt, as well as of covenant will lie; & so when there is a promise. When there is a bond, with, or without a condition, the proper action in Eng. is that of Debt.

It is also the most usual action for Rent, the sum being agreed upon. — And also for annuities. 6 Mod 28. 1 Lid 401.

Payment has always been considered a bar to an action of Assumpsit. In all actions of Assumpsit, payment may be pleaded under the gen. issue. By Stat in Eng payment may be established to a bond, by parole. Thro' Merrin at Com Law.

Wages. In Eng & many of the States will support an action. Eng. & some of the Courts in Con would establish them.

Wages in all cases the recovered must be Contingent, or the contract unknown to the parties; & must have no illegal, immoral, or impolitic tendencies. for such are not enforced in Eng. 1 Ter 56. Cow 729. 5 Mun 2083. Cowp 38. —

Another instance in which relief is sought in Equity, is when one of several Co-obligors has paid the whole, & the others refuse to pay their proportion. Eq will either compel them to repay. Or will prevent the pleading of the payment of the other obligor. In Eq will consider the act of two persons joining that the other will pay his part if one pays the whole
1 Ves Co 315. 3 Bac 701: 2 Vesy 371. 4: 2 Wh R 949. Mr G. can see no reason why the Action of Indebitatus assumpsit will not lie; this is our practice. In Eq it is by writ of Contribution. 7 Wh R 949. 3 Ves 428
8 H. 186.

But when there are more than two obligors it is expedient to resort to Eq to prevent a multiplicity of suits. And this he supposes was the reason of first resorting to Eq.

It is a rule laid down that Equitable interposition extends to all cases where the parties or matter is within the Jurisdiction of the Court. Example. If land is in Md & the party in Pa. N.J. yet the Court will interpose. So if the parties are out of
1 Vesy 204. 447. 2 Ves 494 land within

1 Vesey 454.

It was formerly supposed that Ch only acted in personam & not in rem. That now is lost. The principle by which 1 Ford 31. 3 Atk. 275. 587. 1 Atk 543. 1 Vesy 454 a person is put in possession of land is by a writ of possession or injunction.

They act in personam by imprisoning, sequestering goods, fixing penalties, & by punishing for contempt.

The practice of acting in rem, it is said first commenced in the reign of James 1st.

1 Vesy 453. & 4.

It is necessary to ascertain what an subject will come within Ch Jurisdiction. It is a general rule that Ch will decree in rem in those cases where Law will allow damages.

2 Ld Raym. 15. Amb 406. 2 Freeman 217.

According to this Rule Ch will not enforce a voluntary agreement. By voluntary agreement is not meant agreements between Husband & wife, Par & Child.

1 Bro Ch 341. 242. 12 Atk 10. 1 Strange 738

1 Vesy 74. 450.

They will not decree because courts of Law will not give damages, as as Powell says only nominal damages.

A covenant to stands in B place & leave him handcuff with regard to trades by custom. Then Ch retained it, because relief could not be had at law without many suits. Ch will decree the performance with respect to the personal only, when there are fraud, as the ~~damage for~~ mixed damage for breach of the covenant broken. A files bill alleging fraud, B bill is dismissed & the covenant established & damages given. He at and not have commenced his suit in Ch, but as B brought him there he may pursue relief there. B by the damages, or specifically on specific perf.

1 Eq Ca Abr 17. 1 Ran Ch. 526

It is a rule also that if a bill is brought on a personal matter, & the Deft does not demur to it, he waives the exception to their jurisdiction, & Ch will determine the bill. Then it is otherwise, Courts will dismiss ex officio.

Gilb Rep Eq. 227. 2 Ch. 215.

If the agreement respects land, or the performance of something in specie, Ch will usually decree specifically, for here law relief is not adequate. If a tort is done Ch will not in dem & put the plaintiff in possession by a writ of possession.

1 Ran 526. 1 Vent 27. 8. 2 Ch. 219. 1 Pl 282

Upon agreement concerning the personalty the realty on the other, Ch will decree the performance on both sides. 1 Pl Rep. In Reg & Pell Lane, they will decree the accept, or to convey.

2 Pl Ca 219.

That is a general rule that Ch will decree an agreement respecting realty yet if the lands are not specified, they will not order it, for it would be virtually making a contract. 1 Pl 430. 1 Fonb 359.

He who demands a specific execution must shew either that he has done or is ready to do his part of the contract, for he who applies for Equity must do Equity. 1 Ves 87. Lalk 112. 2 Pl Ca 19.

It is a general rule that when the Pff has performed part & is prevented from performing the whole, he cannot have a decree against the opposite, for the performance must be done totally or not at all. 2 Pl Ca 19 1 Fonb 385. Where a man & wife joined the father would make a settlement, & did many but wife died before settlement been & would not have agreement. Finch Law 445. 2 Freeman 35. Skinner 287.

Yet he thinks Ch will restore the party to the same situation as before part fulfilment.

So when a case falls within Ct Equity
they will decree a Specific performance in
those cases wh. which could be recovered
damages at law; but not always in them.
If land has been agreed to be sold, yet Ct
will not decree specifically if the land has
been sold for a valuable consideration to a
bona fide purchaser. Yet here damages
could be recovered at law
1 Ferr 359. 1 PW 202. 429. 2 Com 330

When there has been an agreement which
has been ~~[illegible]~~ inadequate, Ct will not decree specifically
at Jud. Creditors. Jud. give general
liens, ~~[illegible]~~ agreements specific: and Ct
will enforce specific liens & general.
Yet ~~the~~ law will give damages
1 PW 202.

When the bill is to compel the Deft to
pay the consideration & accept the land
Ct will not compel if the Pltff title is
encumbered, or would subject Deft to trouble
2 PW 201: 1 Ferr 178.

If one agrees to sell land belonging to
another, Ct will not decree specifically,
yet Damages can be recovered at law.
1 Ferr 161.

When law will not give damages Ct
will not generally decree specifically,
but there are exceptions.

As when there is an agreement upon coverture to be after during, Ch. will decree specifically; the law gives no damages.
2 P W 243.

As when there is an agreement during coverture. At Law they cannot contract.

2 As if the contractor is an infant & agrees to settle during coverture, if by consent of parents & guardians with adequate consideration.

2 P W 244. 2 Atk. 607. 1 Port 68. 9.

As when money is lent to an infant to purchase necessaries, & necessaries are bought, it will serve covert. At Law in 1 Port 68 damages can be recovered.
1 P W 550. 483: 5 Mod 368: 2 Po Cr 258. 9.

When an agreement arises under the act of the court of Ch, Specific Performance will be compelled, the another Court would not give damages. 2 Pow Cr 14.

When the condition of the bond is destroyed by the obligors becoming bankrupt, Ch will compel the payment to creditors. The no remedy at law. 10 Mod 515. 9 Mod 62.
2 Pow Cr 254.

There is the principle exception in the latter part of the text.

If there is a good agreement in substance & in operation by reason of formal defect it Ch will decree. This is laid down by French

as the distinction between when they will & will not decree. 2 Pr Co 17-254

There are some cases in which Ct will give relief tho' relief could be had at Law, for it is a rule of Ct that when Ct has assumed an ancient jurisdiction a new law giving Law Courts jurisdiction does not oust Ct. — Also tho' there are collateral circumstances growing out of the Law Jurisdiction in which adequate remedy can not be procured, then Ct may be appealed to, as when there is no evidence. It is sometimes obtained, & sometimes the testimony is carried to Law & availed of. Hinds Ct Title Bills for Discovery.

It is generally true that a Court of Ct will not decree the execution of contracts for personal property, because relief can be had at Law. 2 Fy Cs Ch 19. 2 D. C. 215 1 Vern 447. Wimbarne 111: 1 P W 570.

But these personal contracts depends upon the particular circumstances; for when the ends of Justice require a specific execution & the parties require it, Ct will decree the performance. If for instance there has been many breaches Ct will direct the Trustee to enjoin the monies, & end it by one decree. Then Law will require as many suits. 1 Vern 189. 201. 3 Atk. 383. 1 Fy Cs Ch 393.

and supply the defects of the Com Law.
Ch cannot go against the Com Law but
when there are any collateral & unforeseen
consequences growing out of the Com Law
that Ch will prevent it was not contem-
plated & believe. In instance at Com
Law there is no specific relief; 1 Fonb 370.
Mitford 3.4.

Of Specific Performance.

This has been decided from the time of
H. 4. from this time to James 1st there
was a controversy upon this point between
the K. & Chancery. 1 Fonb 278. 2 Po Ch 5.6.
Salk 172.

Ch will decree the specific performance
of marriage settlements. 1 Fonb 89-93.
1 Atk Ch 442. & Ch 551.

If a bond is taken before marriage by
one of the ~~[illegible]~~ parties, conditioned to
make a settlement, either during or after
the marriage Ch will decree a specific execution.
Ch consider the condition the act the agreement
& the penalty as mere
2 Atk 92. 2 Ven 480. 2 P W 243. 1 Po Ch 316.

If a bond is given to be executed after marriage
it is good at Com Law, & is not avoided by the
marriage. Hob 216. Salk 325. 5 Co 381. 1 Ven
480. It was formerly a rule that all agreements
between husband & wife were void unless the the

in prevention of frauds. But now it is a general rule that they are good in Eq. without their intervention. 3 Atk 332: 3 Ves Ch 340 Pr Ch 22. 9 Mod 270: 1 Vern 245. 2 Vern 208.

But such agreements between hus & wife is merely voluntary & unwarranted with any circumstances of fraud are void as against creditors. Which is correct in Debt & the conveyance is without any consideration from her or any other person they are not valid against creditors.
Prec Ch 95. Pr Ch 22: 3 Atk 339

The husband agreeing that he may revoke at pleasure, & that he should remain in possession after marriage is to her sole & separate use, & all the property he had, or voluntary, & any other badge of fraud Eq will not enforce it.
Pr Ch 22. But Eq will support it as between Hus & wife. Comp 708. 9 Mod 15. 93. 2 Vern 510. 3 Ves 82.

[illegible] when the party is not in State prepaying performed part, yet he shall have a dam. 1 Sch & Lef 70. P Ch 312: 2 Ven 210.

There is a difference between marriage settlements & other agreements, in the application of these rules. In the case of marriage settlements the children of the marriage can compel a performance tho the performance on one side has not taken place & cannot: this is not on the ground of parties.

The rule is the same with regard to the wife when she is not a party to the contract. Finch Law 445: 1 Vern 377. 8.

If however the Plff has been ready to perform & was prevented by Deft it is equal to actual performance.

Lit Ven 335: Stg 535. 1 Fonb 383. 1 Ch 638.

But it is bound to be when there are independent covenants, he must shew performance or have not recovery. 2 Ps & 21. 2. Stk 112. Hob 88. 1 Fonb 383. 2 Bth R 312.

Power of Chancery

The powers of powers of Chancery are not exactly defined. Lord Nottingham was not confined by any rules. Lord Kames says Ch. 1st states the signs of the Com Law. 2d Ch. is decides according to the spirit & not the letter of the law. Others say that fraud accidents & trusts are peculiarly cognizable in Equity. Mitford 5. 3 Wh. 329. This maxim that Equity cannot control but must follow the law — of course it is not correct to say that it deviates the signs of the Com Law. 2 Wh. 370. 2 Wh. 239. 3 Wh. 435.

It has been said that Ch. decides according to the spirit of the law. Lord Coke & Courts of Law & the rules of construction are the same in both Courts. Both Courts also construe contracts ~~alike~~ by the same rules. But is this there an exception in the case of secret trusts & Mortgages. 1 Wh. & Doug. 264. 3 Wh. 431. 234. 438.

It has been said also that fraud accidents & trusts are peculiarly cognizable in Ch. That frauds of any kind are in the same way cognizable in Courts of law. Indeed in some instances frauds are exclusively cognizable in Courts of law. As when one wishes to prove that a devise was obtained by fraud. Bro. 2 691. 1 PW 287. 584. Wh. 177. 544.

Of Detinue.

This action is almost obsolete. The judgement in this case is for some specific thing, different from remedies by all other actions at law.

It was long since found, that this action as it originally stood, did not answer the purpose. And it was thereupon altered; and left an alternative, either to deliver the thing up, or pay certain Damages. Co Lit 286.

Judge B- thinks that this action will lie in all cases, whether the property came into the deft possession, lawfully or unlawfully. — It is said that if it came by trespass, you could not bring Detinue, tho you could trover. — The reason of this principle is; that formerly it was held that trespass divested a man of his property; & that after suing a man for the trespass, there was no remedy left for the recovery of the land excepting by the Writ of the title, the property of the land vesting in the mean time in the Defendant.

It has been always held that Detinue does not lie against Executors as such; unless they are in possession of the property sued for.

This action must always be for something specific But not for money generally, without defining the particular pieces, or the bags in which it was contained. 1 Roll 606.

Of the powers of a Court of Chancery

One power which they possess, & solely, is that of carrying certain contracts into specific execution. From this it must not be understood that they can carry them into execution at all event & that no alternative is left to the party against whom they decree but a decree for a specific execution, with a penalty annexed to it in case of non performance. — They do not generally act in rem, tho' there are cases where they do.

This power of decreeing a specific execution is not invested in them only in cases where there is no remedy at law by damages; but exists concurrent with such remedies.

If a contract is of such a nature as cannot be recovered at law; generally speaking it cannot in Equity. Therefore generally a contract must have inherent in it all the good qualities, to entitle it to be recovered upon in Equity, that is required at law. 16 Vin 16: 1 Atk 406.

The power of decreeing a specific performance is principally exercised over real transactions; & not personal. For the objects of personal contracts are generally as well answered at law in Damages; but those of real are not. But there are numerous cases where personal contracts will be specifically decreed, they being peculiarly situated. As when a man, who was on the eve of departing for India, had bargained for a large

Quantity of Stock, the omission to perform the bargain for which would be attended with great inconvenience; in this case Chancery decreed a Specific Performance. 2 Ved so also when a man had contracted for ~~to~~ to have a Ship built for him by a certain time; & in reliance upon the contract had purchased a cargo; Chancery decreed a Specific Performance. 2 Vern. 94.

It is the rule that a contract to recover in Equity must have all the requisites that are necessary for a recovery at law; there are some exceptions. If the contract cannot be recovered upon at law because of some internal defect; no more can it at Chancery. — But if it cannot be recovered at law because of some defect in the parties, then Chancery will afford a remedy. As when there was a bond given by the husband to the wife; this at Law could not be sued, because they do not recognize the idea that man & wife can support actions against each other; but Ch. will afford a redress. 2 Atk 243. 1 Bl Ray ~~Stratton~~ 515.

If the contract contains an alternative, in case it be not specifically performed; Ch will not interfere, for this would be to thwart the intention of the parties, which Courts of Chancery never do. 2 Br Ch 341. 10 Ves 570.

This power of decreeing specifically is generally a legal & discretionary, that is sound discretion. If it should appear that there was any hardship in the bargain, or that there was any advantage taken, Courts of Chancery will not lend its aid by decreeing a Specific Performance. But an unfortunate bargain is not such a one as Chancery will refuse to decree specifically. 2 Vern 515. 632. 3 Br Ch 538. Chancery considers wherever orders to have been carried into effect as actually executed. — In by when Ch decree a thing specifically, they at the same time decree a conversion. In Ex they leave the parties to their remedy at Law.

Cases in Ch power of rescinding Contracts in whole or in part.

In exercising this power there is one principle that they uniformly attend to. That is to do equity completely on both sides.

When there has been a mistake about the thing contracted for, were a fraud, they will rescind. Not however for every mistake, but when there is a mistake as to the thing itself, & the contract would not have been made if the parties had not laboured under it; — if it was merely such a mistake as would have enhanced the price, they will not rescind the contracts, but will turn them to a Court of Law for redress. As an instance when Cts of Ch will rescind. If A purchased a piece of land of B, with a confidence, & under of full assurance from B, that there was a salt spring on it, the ascertainment of this spring being the moving cause of the bargain; but owing to a mistake they were both deceived as to the fact; here Chancery rescinded the agreement. — And so did they also, when a man wishing to purchase a negro boy, & thro' mistake purchased a girl. — But when a man purchased a boy of about a dozen years old, & the proved to be but nine, it was not deemed a sufficient mistake to rescind.

There is one case where Courts of Law give redress for mistake; & where money has been paid by mistake; not for any collateral article.

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When a party has mistaken his rights, Courts of Eq will rescind; as when a man renewed a note given under Duress upon an impression that he was liable. 1 Vern 32. 18 Vern 370. 1 Vesy 126. 400.

A man is not prevented from coming to Chancery because he can get compensation in damages.

Fraud is another ground for Eq to rescind a contract; that is direct fraud. As when a man has by his own acts, words, or concealment, induced another to make a bargain.

Falsehood, & concealment of truth stand upon the same ground both at Law & in equity.

Law & Chancery have a concurrent jurisdiction in these cases. One of them compensating in Damages, & the other by rendering them void.

In Eq it is not necessary to go to Chancery (in case of actual fraud) because upon an institution of an Action upon an obligation given in the contract, fraud may be pled. But to try you cannot plead it.

If injustice is like to be done by reason of Bankruptcy, Chancery will interpose in personal contracts. As when a bankrupt cheats a man in the sale of a horse, & sues upon the obligation; here Eq will interpose to prevent a recovery; by means of which the Obligee would be cheated out of his money; as the bankrupt would not be able to refund.

When the bargain was an unreasonable one, & advantage was taken of the peculiar situation of the party, Chancery will rescind. As when a creditor imposes another man, and threatens him with immediate imprisonment, by which influence the oppressed party conveys his farm to him for a fourth part of its value. — & when advantage is taken of the distresses of a prisoner to procure him to make a very disadvantageous alienation of his property; Chancery will rescind.

In these Cases, the Judge knows of no remedy at Law. In the other Cases, Eq & Law seem to have a concurrent jurisdiction.

If a man gets another drunk, & then makes a bargain with him, it is void. — And if he found him drunk he thinks that would likewise be a good ground for Eq to rescind; upon the principle of taking an undue influence of the situation of a man.

Fraud on third persons is another ground for Eq to interpose. As when friends mutually agree to make settlements upon the parties, who are about contracting marriage; & to induce one party to give more another ostensibly does, taking a secret agreement to repay. This is a fraud upon the other friend, & Eq will rescind it.

And Eq will rescind a secret agreement to give one creditor more than the others, to induce him to compound; and this tho' the surplus is paid by relations & is no disadvantage to the other creditors.

So also where the contract is obtained by duress. This is void at Law. Eq will also rescind it. — Chancery in this case is usually resorted to for redress, to relieve the party from the obligation when they are not sued; that redress may be obtained while the witnesses are in being. — Rescinding upon the ground of duress at Law, is only in Case of legal Duress.

But Chancery goes much further: even in cases when there is only an undue influence: such an influence, as, had it not existed, the contract would never have been made. But if this influence is a proper one, as reverence & friendship, here altho' if it had not existed the contract would not have been made, yet they will be held legal. 1 P W 118.

Another class of cases are void upon the ground of sound policy. — Courts of law have jurisdiction in a certain extent; and as far as they have jurisdiction, Ch will not interfere. Those void at law upon this head, are such as are contrary to good morals; & such as have a tendency to introduce indecent testimony &c. In these cases Ch assumes no jurisdiction.

Judge N — Knows of but two kinds of cases that are void in Ch upon the ground of general policy. viz. Marriage Brokage bonds; & Contracts for the disposing the expectancies of heirs; as well those own, as under age. 1 P W 131. 2 Vernon 346. 2 Atk 34. But contracts made with young heirs, may be confirmed after their ancestors death. 1 Atk 354.

Chancery Jurisdiction over usurious Contracts

Common Law Courts will decide all contracts respecting usury to be void, if they can prove them to be such. And if the money has been paid, they will order that which exceeds lawful interest to be refunded.

When Cts of Chancery interfere, they do not proceed vindictively; but only to restore the parties to the situation which equity demands. And the principle upon which Chancery interferes, is, that an undue advantage was taken of the situation of the party petitioning. It is not here to be understood that they will interfere because it is a hard bargain. — They will presume this undue advantage from the circumstance alone of taking usury; going upon the idea that no man would give it unless distressed. 1 Atk 405. 2 Atk 393.

The reason of going to Ch, is not that a man does not chuse to avoid the contract wholly, for he might after recovery at Law repay what his conscience revolted at taking; But because they have a rule of testimony that is not admitted at Law. This is by appealing to the Defts conscience, with regard to the nature of the transaction. But the Deft in acting as a witness here, no more than witnesses in any other situation, is compellable to answer questions, which would subject him to Criminal prosecutions, or penalties. For by the penalty which is fixed upon a man for the crime of usury, is given to the party giving it alone; and if he will waive his right to prosecute for it, which waiver will be effective in Law, the Deft may be compelled to answer. — For Con however the penalty is given to any Common informer; and consequently a waiver by the Deft does not render the Deft liable to answer.

By Eliff. If in Con, where an usurious obligation is sued; a bill may be filed against the obligor the second day of the Court, by which means the Court is enabled to search out the obligee, if he refuses to swear, he will be non suited. The [illegible] from the obligor, if it appears that the obligation is usurious, judgment is rendered for the [illegible] recover the principle, with the usurious & lawful interest being struck [illegible] Statute enables the [illegible] to exceed the powers of a Court of

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Ct. Ch power over penalties.

Courts of Chancery exercise a very extensive power in respect to relieving against penalties.

If for instance a man should agree by a specified time to pay £100. and in case of failure, that he would pay £200. Courts of Chancery will relieve; tho' courts of law will not. The ground is not that it is usurious, for no condition is usurious which the party can avoid by performance. — The conceiving that they relieve upon the ground of its being against sound policy. However an illegal street of pr[illegible] in this might have been when Ch. first assumed it; yet it is now uncontroverted law, & is universally acquiesced in. —

In granting relief in this case they do complete Justice by allowing him principal & interest. If the penalty is trifling Chancery will not relieve.

Since the assumption of this power in Ch; Acts have frequently been passed; investing courts of law with this power, of cutting down these bonds to what is right.

Chancery now relieves in cases not embraced by these statutes. If the bond is to pay money, the rule is that it shall be cancelled down to principal & interest; but if it is to do some collateral act, then to what would be reasonable damages.

If it should appear from the face of the contract, where a man obliges himself to do a collateral act, that the penalty was merely as liquidated damages; Ch will not relieve. Nor will law vary the contract.

So also if the penalty was by way of election, the contract being in fact that one thing or the other should be done; then Ch will not interfere. But this principle of relieving agt. penalties applies only when the penalty was by way of security. If for instance a man agrees that another should have the refusal of his horse for a week, with a condition, that if he chose to sell it in the intermediate time, he might upon paying five dollars; here is for instance by way of election, & Ch will not interfere.

If the bond is not to do a particular act, or to do it at several times, and in the one case the party does, & in the other omits to do; then altho' the bond has been recovered upon for the breaches, yet it stands to answer future transgressions. As when a man agreed not to exercise his trade within a certain place; & to pay a certain sum of money at specified times. 2 Pr 19. 10 Mod 517. 2 Vesey 52. 6 Br Ch Cs 417.

And here it will be well to observe, that whenever it was the primary object of the parties to have something done, then Ch will decree specifically; but if it was their intention to have it done, or to have a compensation by the penalty, then they will leave the party to the ~~remedy by penalty~~ remedy of law. — As when the parties agreed that land should not be ploughed

but that if the party chose to do it he should compensate the landlord by a forfeiture of 20s per acre. 2 Vernon 119.
The presumption in these cases is that the parties intended that the thing should be done specifically.

Mortgages are also a ground for equitable interference.

As when a deed is executed absolutely, upon a defeasance condition, that provided a certain sum is paid by a specified time, then it shall be void.

This practice was a source of much oppression, & sound policy demanded that it should be stopped.

When they interpose in these cases, Chancery will do complete equity; if it demands more than could be procured at law they will give it.

Compound Interest affords another ground for equitable interference. Courts of L[illegible] will not [illegible] usury. This practice is not usury. But is against sound policy.

Legacies afford another ground. Their jurisdiction upon this ground arose from small beginnings; it first originated from the power which is in the King, & in Ch as his representative, to manage legacies given to young orphans.

Upon this head they have concurrent jurisdiction with the Spiritual Courts; but they are usually applied to.

In Cov they do not recover legacies before probate; but at law. Ch in these cases proceed upon the ground that whenever there is a trust, they will decree its execution. Then they consider the Ex & Administrators as trustees.

It is a principle in Chancery, that whatever they will compel to be done, they will look upon as done. Proceeding upon this principle Chancery in the following case — viz. When J. N. covenants with J. S. to sell land for £40. & J. S. agrees to pay it before a specified day; before the arrival of this day J. N. dies. Chancery will decree it to be done; and will consider the £40, as part of J. N's personal estate, it being J. N's intention to have it. And if J. S. should die, the money would be applied to this purchase, which would be his real estate. 10 W 522. 3 P W 211. P Ch 543. 2 P W 171.

And the same rule holds in Wills when a man directs money to be laid out in land; Ch will decree it, & it will go to the heir. If land was ordered to be sold, the proceeds will go to the Ex. There is no power invested in Cts of law to act upon this subject.

If land was ordered in a will to be sold for a specified purpose, & there is a surplus, it will go to the heir. 1 Vernon 471. 2 Ab 679. 3 Atk 254. 1 Slk 154. Of Other Powers.

When lands are by a will ordered to be sold for the payment of debts, there is no remedy at law for the compelling of the execution; recourse must be had to Chancery, who will compel the Ex or Trustees to dispose of them as the will directs.

If the Ex or Trustee refuse to accept the trust, Ch will appoint another.

When Chancery interposes to furnish a remedy, the

proceeds are called equitable Assets. And in equitable Assets all sorts of Debtors participate equally; no preference being here allowed.

In some of the States this is regulated by Statutes. In Cons probate take bonds for the faithful discharge of the trust's of an Ex; therefore upon their refusal to dispose of property, redress may be had against them upon this bond. — But even here if it is given to a trustee to dispose of, recourse must be had to Chancery.

Chancery in these cases compel a performance upon the principle that it is their duty to compel an execution of all trusts.

Chancery has to pay another power which is very extensive. viz. The power of compelling the sale of an equity of redemption; for Courts of Law have no power over them, Law does not recognise any such thing. When an Ex holds these, he holds them as trustee for the Creditors; & Ch will decree them to be sold, unless he will pay the Debts.

In Cons Equities of redemption are liable to be attached; & go into the hands of probate to meet the debts.

They have also the power of Marshalling Assets. This has been fully treated of under the head of Ex & Admin in Ch Cons.

In by upon a mans death, his personal estate only is liable for his debts; excepting Specialties. The land goes to the heir free from all other liabilities for Debts.

Specialty Creditors ~~cannot obtain~~ may to go upon the heir, but also may sue out a sufficiency to satisfy simple contract Debtors, they not remain a sufficiency to satisfy simple contract Debtors, they may come upon the heir, to the amount which the personal fund has been demnished by Specialty creditors; and the power of compelling the heir to pay them to that extent is called the Marshalling of Assets. And the money thus obtained is equitable Assets & consequently goes to the payment of all the debts equally.

An estate in ~~to~~ cannot be conveyed to one for the use of another; for the law at once takes the legal estate from the trustee & conveys it to the one entitled to the equitable interest. But estates may be given to one for the use of another, in trust for a third person. Can the one who has the equitable estate, sain the legal, upon applying to Chancery in all cases? He cannot. This would often go to the defeating of the intention of the testator. But Ch will always compel the trustee to pay over the profits. — And if the reason which induced to the conveying it in trust has ceased to exist; then they will compel to the conveying of the legal estate. And also when a mans situation has become such as to raise a presumption that the Testator would accede to the conveying of the legal estate. As when a man has been imprisoned; has a sick family &c & his necessities highly demand it. — But not in cases where he has become involved thro' dissipation; as for Tavern debts. — In the other class of cases they consider the trustees as trustees for the Creditors, and will compel a ~~pay~~ conveyance to the amount of their debts.

If in Eng, where they have no Records of deeds; the trustee should make a conveyance of the land; it will be effective against the trustee, provided the purchaser was ignorant of the trust.

But altho' the land is gone yet the trustee is liable.
In America, there is no danger upon this ground, for we have records. If a man is employed to purchase lands for another, & instead of taking the deeds in the name of his employer, he takes them in his own name. He becomes a trustee of Law. Then there is no remedy at law for he has the legal title: but Chancery will compel him to restore them.

To prove this trust you must go out of the instrument. The Statute however never contemplated any other than express trusts, in excluding parol testimony. Consequently you do not infringe upon it by so doing. — And by mistaken opinions upon this principle, much evil, & confusion arises.

Altho' you cannot prove, that you did not make an absolute deed, as the instrument imports, but a mortgage; yet you may prove facts, from which it will be inferred. 1 Vern 366. 2 Atk. 150. 1 Atk 409.

Whenever a man makes a bargain, takes a Deed &c. in another's name, he stands as trustee. Provided it is not a fraudulent transaction. If an officer should get another to take an obligation in his name, because he could not levey an Ex for the recovery if it was in his own name, it is a legal transaction; & he stands as trustee. 2 Vern 19. Ib 67. 1 Atk 386.

If a man makes a fraudulent conveyance, he has no remedy to recover from the party to whom he conveyed in trust; but creditors have. 2 Vern 523.

~~The bill of Discovery~~

A man may file a bill in Chancery, in many cases, to get testimony from the opposite party, which he cannot procure from any other source.

When a court of Eq. furnish a remedy, when it can completely be procured at law, excepting what depends upon the testimony of the antagonist: or will they give testimony so that it may be taken to a court of law.

It is often the case that will take such suits & try them; and it also often happens that they will not review them. The principles which govern them as to this are by no means clear. You will acquire the best ideas as to it, by consulting the following cases. 1 P.W. 406. 2 Atk 630. 1 Ves Sr 194. 3 Atk 262. 1 Vesey 521. 2 Ves 61.

There is a practice in Eng, & in N.Y, & many of the other States, in Eq, of sending an issue to be tried by a jury, in a court of law: instead of deciding it themselves; on account of inconvenience, or because they think it will be better found. — In Eq we have no such practice; in some cases however they have referred an issue to a Committee, appointed by the court.

Chancery have another power which is not invested in a Court of Law; which is to take testimony before a suit is instituted. But the circumstances to move them to it must be strong; If it should be made to appear that the witnesses were old, or sick, or about moving to a distant quarter. And when they suppose them to be taken, they issue a commission to Commissioners, to take them. Our practice in this lately was the same, but now the superior court has been by that invested with the power. This supersedes the necessity of applying to Chancery.

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Another power which Chancery now has, and which varies from what it formerly was, is, to give redress when a bond or deed has been lost, and without any fault of the obligee; or when the obligee has found means to get the instrument into his own hands; provided it is satisfactorily proved. — So far as they give redress when the obligee has the bonds in his own hands, their interference may be justified upon the principle of compelling a party to swear, when there is a light, & he is the only witness. But why do they give redress when it has been lost, or destroyed thro' accident? It was necessary at law, in suits upon deeds, to ~~produce~~ profer them upon praying for oyer; no redress consequently, could then be obtained; — Ch therefore probably interfered to prevent the injustice which flowed from this rule. 2 Dany 151.

But as the law now stands, you may sue at law in this last case, as well as at Chancery, provided you can prove the facts. At present however it is only necessary to go to Ch when the party has got the Deed in his own hands — Chancery however in fact will still give redress, when the Deed has been lost; & this notwithstanding the rule that when you have a redress at law you cannot go to Equity. The reason of which is, as in many other instances, that they assumed the power before courts of law thought proper to give redress; & when they have once assumed a power they will not relinquish it. In Eq however, Ch will not give redress. 3 Atk 17. Hob 109. 1 Vesey 392. 2 Atk 61. 3 Bro Ch 210.

If there has been an endorsement upon the Deed or bond, an inconvenience will follow to the obligor from this rule; he being thereby deprived of the proof of his payments. But this consideration is overruled from the circumstance that the inconvenience would be greater from abolishing the rule. But the obligor still has a remedy left for the procurement of proof, which is by a bill, praying that the obligee may be made to depose.

If Bank Notes, have been destroyed by fire, and the Pltff will give bonds to indemnify the bank provided they are ever produced, Chancery will give redress, if the loss is proved.

Chancery have also a power of compelling ~~partners~~ partners in land to make partition. ~~When the lands have come by descent,~~ Law has also the power in all cases to compel them to decide. How Chancery came by this power, Judge B — does not know. They will compel a partition as well when the land came by will, as in other cases. — It is most usual to resort to Ch to compel partition: When Ch decrees it, the Sheriff as at law takes twelve men to make a division. In Eq the Sheriff does not take but three men; he does not make a return of their acts to the Court, but it is thereby settled forever.

~~When a writing is destitute of some of the established forms, their mistake, or neglect, Ch will cure its defects. But when the parties mistake its operation in Law. And parole proof will be admitted to shew it.~~

When a writing has been imperfectly made, thro' mistake Chancery will interpose; Not when they mistake its operation in law. And as far as this goes parole proof will be admitted.

Allied to this is another power when an instrument is defective in forms; all those which the law requires not being complied with; provided it does not interfere with the rights of third persons. As in case it had but one witness, being a Nuncupative of land; and another by legal process should have a lien upon it, & yet it is his property Ch would not then cure the defect, for it would interfere with the rights of a third person. — Ch 365. 1 Vernon 77.

They have also a power which goes to protect the rights of married women when they have a separate property. — The principle of allowing women to have a separate property is not very ancient; that is to say personal property, they have long & indeed always been entitled to retain real property.
It is now fully settled that the wife may hold such property; and that the husband can no more interfere in it, than if it did not exist.
Chancery assumed this power, under an impression that it was right they should hold such property, & consequently that it ought to be protected. 6 Ch 278. 2 Vesy 452.

If contracts have been entered into before marriage, & the husband does not perform them; she may resort to Ch & obtain redress.
In this & the foregoing case, she cannot sue in a court of Law, for they do not recognise the idea, that husband & wife can sue each other.
If they could maintain suit at law, they could only obtain redress by damages; they not dreaming of specially; and this would immediately become the husband, so that the redress would be nugatory.
2 Vernon 493.

There is another case when the wife can obtain redress, in Ch against the husband. As a general rule it is held that agreements made during marriage are void: But there are two exceptions; viz separate maintenances; & articles for that purpose.

As to the idea that a man cannot convey lands to one for the use of another directly, there is some relaxation as it respects the wife. — [illegible] separate property, she can [illegible] a trust for him to it. — When bonds were given for the payment of something for the wife, it being manifest that it was to be a provision for her after his death; Chancery deemed that they should be discharged by his death. And Law has also adopted it in two instances. — They both go upon the idea that it was given, not as a loan, but a provision. 2 PW 243. 2 Vernon 604. 2 Atk 97. 2 Vernon 437. 1 PW 264. 3 Pr Ch 201. a Mr Ch

Contracts, as before observed, are always treated as void at Law; when made between husband & wife. But there are cases when Chancery deems them to be good. As when a husband agreed that a wife should have certain profits arising from her labours; to encourage her to industry. 1 Atk 270. 3 PW 334. 3 Pr Ch 340 a Mr Ch

It has frequently been observed that many contracts, which are void may be confirmed; & that there are others which cannot. If the contract was set aside upon the ground that it was illegal, then it cannot; for it was set aside upon the ground that it was against public policy; then they set it aside for the public benefit.
But if they were set aside upon the ground that it was ~~against public policy~~ obtained by undue influence, as duress, taking advantage &c then it is for the benefit of the party; & may in these cases be confirmed.
The case of young heirs contracts to come under this head. 1 Atk ~~[illegible]~~ 354 a very important case. 1 Vernon 75. 237.

They also exercise the power of relieving against the lapse of time as it is called. As in case when Ch have decreed that unless a party redeem before such a time he shall be forever foreclosed.
If by inevitable accident he was prevented, they will relieve notwithstanding. — And even if some trifling degree of negligence ~~[illegible]~~ marked the conduct of the person praying, they will give redress.

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Another weapon besides penalties, which Chancery makes use of is, injunctions. These are orders which are sent to the party suing, or to the Court, to stay his law suits would be the consequence of their proceeding.

Injunctions go either against the parties, or the Court generally; but there are some cases where they do not go against either.

When a man has sued upon a contract infected with fraud; Ch. upon petition will grant an injunction; for fraud cannot be plead. In Eq. fraud can be plead, but notwithstanding recourse may be had to Ch. for an injunction.

These injunctions are enforced, either by a penalty, or by a punishment for contempt.

If the contract was procured by taking advantage of Deceitness, it is one of those which Ch will issue an injunction against.

Injunctions are sometimes granted without any trial of a cause; as against the suing of certain obligations.

When an injunction is issued against a suit, it is for the purpose of having Ch decide as to the point which the party praying contends for, if they find for him the injunction is perpetual, if against him, it is returned to the court, & is merely temporary.

A party may sometimes have a Judgement obtained against him by mistake, instead of trying to Ch. in thinking that he could plead what the law will not allow; then upon petition Ch will grant an injunction against the Judgement, & forbid the party to take, or the Court to allow Execution to be taken out. — If he has in fact been taken out then the injunction will be granted against the Shff not to levey it; and if the Shff has collected the money then not to pay it over. But if he has paid it over, then is an end of the priviledge of an injunction. Then the only way to get at the money will be by a decree from Chancery, upon obtaining Judgement, on a trial before them. 10 Ves 620. 8 Ves 350:556: Aust 60 or 63 or 66.

This power of Ch has under peculiar circumstances been exercised in Criminal matters. As in the following case. There is a law in Eng that a man who interferes with another fishery, is liable to a criminal prosecution. There was a contest about the right of one; while the suit was pending, a criminal one was instituted. Then an injunction was granted. 22 Ves 302. 2 Bro 64.

Injunctions will be granted when one undertakes to print books, the copy right of which another claims. Injunction will go against the printing till the right is tried.

There are a set of cases where Ch will grant an injunction, which is said to interfere with the principle, that Ch will not interfere when remedy can be had at law. Then it will be proper to observe that it does not extend to cases where the remedy sought for at Chancery is different from what is furnished at Law. —

The cases are — When you can plead a complete defence at Law upon being sued; but the party wants to be rid of them before; for fear that the Witnesses upon which he relies will die, before the suit is instituted.

Also when partners had many contentions, upon bonds, notes, Book Debts &c. And Law can not furnish remedy but by a long course of proceeding; not having the power to examine them & undeceive unless the parties consent, & enquiring for book Debt & Accompt. Then Ch will interfere

And furnish a remedy by the aid of a bill of peace; going upon the ground that it was not at law an adequate remedy.

Bills of peace are not issued in Eng except by the legislature, who sometimes act as a high court of Chancery.

Chancery will set aside unlawful contracts, by ordering them to be rescinded; ~~Then the they cannot be enforced at Law~~ they just assumed this power before courts of law had 2 Wills 347. not obvious of their being sued. But now they can be so. However law will not enforce them if

There is a species of illegal bonds; by Thereof in for cohabitation. Then if they are in consideration of past are good; but if for future are void. 2 Will 339. 1 Atk 641. 3 Bro 15 Cp. 330 1 Vent 483. 2 PW 432.

Another branch, is respecting the assignment of bonds. This the Com Law considers a crime; but Ch to a certain extent will furnish its aid. Ld Ray 603. 2 Vernon 540.

So also when one of two joint obligors in a bond has paid the whole of it; Ch will grant relief upon a bill being presented. by contribution

In Com Law will relief; and by a writ of contribution.

As has been begun and Ch will decree the performance of an award. This is not upon the footing of its being an award, for Law recognizes in this case; but because something has been done under it which shows an agreement to abide by it.

And here is another case where they will decree in personal matters a specific performance. 3 PW 187. 2 Vernon 24.

Another class of cases is when one of two or merchants in company have died; in which case the survivor in his own name is liable without calling in the Ex. Ch will relieve the survivor against the Ex. — In Com The courts of Law have declared that in this case they will not relieve.

When there has been judgments obtained by parties against each other, Law will not intermeddle, but will make them mutual to receive the amount in the usual manner, excepting in the case of bankruptcy. But Ch will decree a set off.

Instruments sometimes have a different construction at Law & equity. If it appears that it was the intention of the parties that it should be performed specifically, Ch will so decree. 2 Vesey 373 / other cases, on other heads 2 Vesey 48. 571. 74. 2 PW 243. Ld Ray 603. 2 Vent 540. 3 PW 187. 2 Vent 24.

It is a principle in Chancery that when a man petitions for equity, he must do equity. Therefore when he would have a performance decreed against another, he must show that he has done his part.

There are cases however where it has become impossible, physically so, for him to perform. As in the case where a man agreed with the father, in consideration of monies paid him, to settle a jointure upon his wife who was the daughter of the other party within two years; and before the expiration of that time she died. Equity will not in these cases interfere; but will refer the party to Law Courts, to seek redress if they can then obtain it, otherwise the party must go unrelieved. 1 Vesey 87.

But if the party petitioning in this case, has partially performed, Chancery will decree a specific performance, provided the party is not in State quo. But if the party is in State quo even after a partial performance Ch will not interfere. Finch 445. 2 Freeman 35. Skin 287.

When a man has engaged to do an act which the law forbid he is excused from the performance; if the law only renders it partially void, then he is only excused to that extent provide the opposite party thinks proper to accept of that much. As was the case when certain Bishops made a lease for 99 years, & agreed to renew it for the same space of time at the expiration thereof, and in the intermediate time parliament passed an act forbidding these leases to be made for a longer term than 40 years. Then the party upon praying to have a lease for 40 years granted, was relieved. 3 Pr Ch Cs 339.

Notwithstanding the contract is even so fairly made, yet if there arises substantial doubts afterwards, as to the title of the party, before the fulfilment, Ch will not decree a performance. 2 PW 199.

But if the probability is [illegible] the title is a good one; they will decree it to be performed specifically. 2 Atk 19. 20.

Chancery considers whatever ought to be done as done in fact. And all the consequences that would flow from an actual performance, will attach to it. As in the case when a man made suit to an orphan of London; & one of the conditions of marriage was that he should become a freeman of the City, within a year, and died without performing the condition. Then Chancery considered it as performed, and attached all its consequences to it. 3 PW 215. 1 PW 710. 4 Pr Ch Cs 7.

It is a rule of the Common Law, that lands shall be liable for bonds & deeds;— Now if a man acts to sell honeyed lands, & dies before fulfilment; these bonds cannot come upon the lands; that principle still operating. 10 Mod 468.

If however there had been subsequent mortgages, without notice of these articles, this principle does not apply, the land being liable. But here they proceed upon a different ground. It is because the legal title is in the mortgagee, & also an equity; which they deem sufficient to ballance the equity arising from the articles.

Is the vendee in these cases liable to any loss which happens, before he acquires possession? The vendor must bear the loss. 2 Vernon 280.

When the bargain was complete the purchaser would be liable at law.

But these cases must be distinguished from those, where the bargain was such that the parties might abide, & recede from it at pleasure. 1 PW 61. 1 Pr Ch Cs 151. 2 PW 220. 12 Powell Cs 61 you will see this doctrine fully illustrated.

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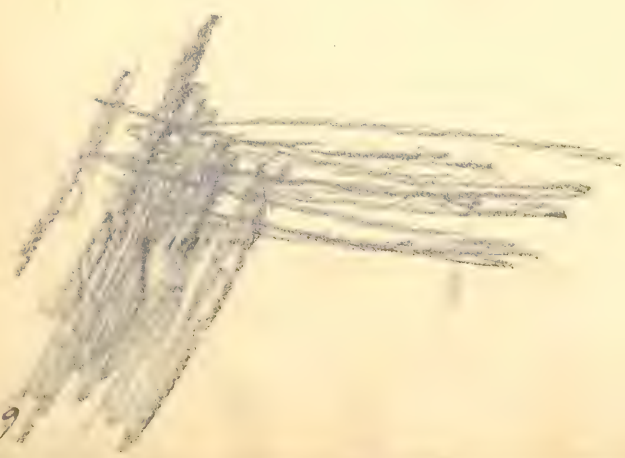

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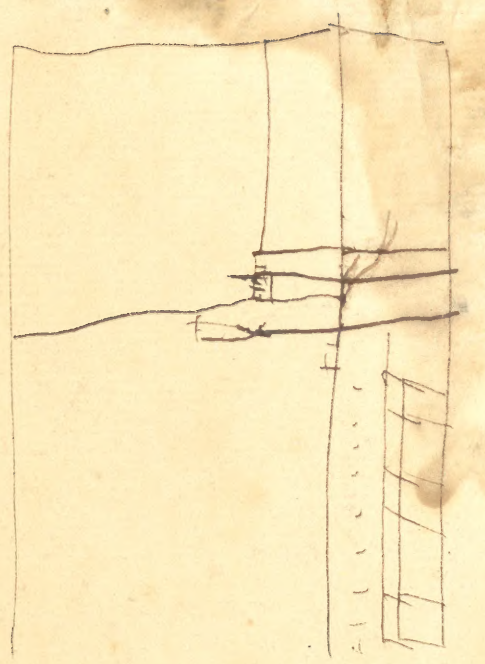

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